

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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4 The State of Minnesota,

5 by Hubert H. Humphrey, III,

6 its attorney general,

7 and

8 Blue Cross and Blue Shield

9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated, R.J.

13 Reynolds Tobacco Company, Brown

14 & Williamson Tobacco Corporation,

15 B.A.T. Industries P.L.C., Lorillard

16 Tobacco Company, The American

17 Tobacco Company, Liggett Group, Inc.,

18 The Council for Tobacco Research-U.S.A.,

19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 - - - - -

22 DEPOSITION OF RICHARD M. LOWTHER

23 Volume III, Pages 455 - 581

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1 (The following is the continued deposition
2 of RICHARD M. LOWTHER, taken pursuant to Notice of
3 Taking Deposition, under Rule 30.02(f), at the
4 offices of Robins, Kaplan, Miller & Ciresi, 2800
5 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis,
6 Minnesota commencing at approximately 8:35 o'clock
7 a.m., June 6, 1997.

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1 I N D E X

2	EXHIBITS	DESCRIPTION	PAGE MARKED
3	Plf's	238 Letter dated May 6, 1997,	
4		Willoughby to Wivell, with	
5		attachments	496
6		239 Letter dated February 7,	
7		1995, Pekera to Lowther, Bates	
8		282015671-87	512
9		240 Letter dated April 4, 1995,	
10		Pekera to Lowther, Bates	
11		173000306-46	512
12		241 TX confirmation report,	
13		handwritten, with attachments	
14		Bates 173000361-71	512
15		242 Letter dated July 3,	
16		1995, Lowther to Barton, Bates	
17		173000229	512
18		243 Memo dated 9th October 1995,	
19		Harvey to Lowther, Bates	
20		187000056-60	529
21		244 Fax cover sheet dated 09/01/95,	
22		Smith to Lowther, Bates	
23		187000114	529
24			
25			

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1 245 Supplemental Responses to
2 Certain of Plaintiffs'
3 Interrogatories to B&W 569
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1 P R O C E E D I N G S

2 (Witness sworn.)

3 MR. SCHNEIDER: Marti, just to be -- I'm
4 sorry.

5 Ms. Wivell, just to be clear, this -- the
6 witness will read and sign as with respect to the
7 other depositions. I just want to put that on the
8 record.

9 MS. WIVELL: All right.

10 RICHARD M. LOWTHER
11 called as a witness, being previously
12 sworn, was examined and testified as
13 follows:

14 ADVERSE EXAMINATION (cont'd)

15 BY MS. WIVELL:

16 Q. Good morning, Mr. Lowther.

17 A. Good morning.

18 Q. Welcome to Minneapolis. Have you been here
19 before?

20 A. No.

21 Q. You understand that you're here because the
22 court granted plaintiffs' motion to compel relating
23 to questions concerning the first deposition, the
24 collection and production of documents by Brown &
25 Williamson; is that correct?

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1 A. I understand it's relating to the scope of the
2 searches that were done, that's correct.

3 Q. All right. And do you recall that back when we
4 first met that first day, I had asked you questions
5 concerning the scope of the statement, and you had
6 referred to an extract statement; is that right?

7 MR. SCHNEIDER: Object to the form.

8 A. I recall that, yes.

9 Q. All right. Have you had a chance to review the
10 extract statement or the scope statement -- well
11 strike that.

12 Have you reviewed what you referred to as the
13 extract statement since that deposition?

14 A. I have -- I have seen it in preparation for
15 this -- this deposition, yes.

16 Q. And do you understand that that is a document
17 that has more than one page?

18 A. Yes, I do.

19 Q. How many pages does that document have?

20 A. It has four pages.

21 Q. Does that document have a title?

22 A. I don't recall. It has a heading, I don't
23 recall what the heading is.

24 Q. Do you understand that it is what has been
25 referred to by Brown & Williamson's lawyers as a

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1 scope statement?

2 A. I believe that's correct.

3 Q. I just want to make sure that we're all on the
4 same page with regard to that document. Is there
5 more than one scope statement?

6 A. It's my understanding that in respect of the
7 Minnesota case there is one document that is being
8 called scope statement that was prepared for use in
9 the active searches of Brown & Williamson facilities
10 in preparation for discovery in this case. There may
11 be other scope statements in respect of prior
12 litigation, but this is the only scope statement that
13 is -- that was made use of in the Minnesota case.

14 Q. All right. And that's where I'm going, is to
15 assure myself that what you looked at back in
16 February of 1995 when you were shown what you
17 referred to as the extract statement is really part
18 of what you now know to have been referred to as the
19 scope statement. Is that right?

20 MR. SCHNEIDER: I object to the form.
21 Marti, I think -- I think it's '96.

22 MS. WIVELL: I'm sorry, let me start
23 again.

24 MR. SCHNEIDER: And before you -- let me
25 just interrupt. Can you tell me how to get this

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1 (referring to real-time computer) on line here?

2 THE REPORTER: Off the record, please.

3 MR. SCHNEIDER: Sorry.

4 (Discussion off the record.)

5 BY MS. WIVELL:

6 Q. Is what you looked at in February of 1996 as
7 part of the sweep of your department's files what --
8 a part of what you now understand to be the scope
9 statement?

10 A. It's my understanding that in February 1996 I
11 was given the scope statement to look at during a
12 meeting with outside counsel. It was then taken away
13 before the sweep was actually undertaken within my
14 department.

15 Q. All right. You told me before when we talked
16 about the extract statement that it was a one-page
17 document; didn't you, sir?

18 A. I did.

19 Q. All right. I'm having trouble, and perhaps you
20 can explain it to me, because the scope statement is
21 a four-page document; isn't it, sir?

22 A. Indeed it is.

23 Q. There seems to be some contradiction here. Can
24 you help me out about how you could have testified it
25 was a one-page document when it was actually a

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1 four-page document?

2 A. My testimony was based on my recollection at the
3 first deposition. My recollection was that I'd seen
4 a document that outlined the kinds of things that
5 were to be collected from my department, and that was
6 my -- my recollection at that time.

7 Q. But you're sure, and your testimony here is
8 correct, that what you saw in February of 1996 was
9 actually the scope statement that you have reviewed
10 in preparation for your testimony here today.

11 A. I believe that's right.

12 Q. Do you have a copy of that scope statement here?

13 A. My counsel has a copy of the scope statement.

14 Q. Is that it turned upside down next to you?

15 A. I don't believe it is.

16 Q. Okay. But you have reviewed that scope
17 statement in preparation for your deposition today.

18 A. In preparation for the deposition today I've
19 reviewed the document requests prepared by
20 plaintiffs, and I have reviewed it against the scope
21 statement, and reviewed the two in conjunction with
22 my outside counsel, yes.

23 Q. All right. Just so we're clear here, I really
24 just asked you whether you had reviewed the scope
25 statement in preparation for your deposition. And

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1 the answer to that question, then, is yes; isn't it,
2 sir?

3 A. I have read it.

4 Q. All right. What type of information does the
5 scope statement contain?

6 MR. SCHNEIDER: I object to the form. And
7 Marti, I would note that the court has stated in its
8 order that the scope statement or extract listing
9 shall not be disclosed to plaintiffs absent proper
10 showing, so I don't want him to discuss the content
11 of the scope statement per se. But again, obviously
12 he's free to discuss what the scope of the search
13 was, and I want to try to do that without tying it to
14 the specific content of the scope statement.

15 MS. WIVELL: Well that's why I asked "what
16 type of information." I have not asked for the scope
17 statement; my question clearly does not call for
18 that.

19 MR. SCHNEIDER: I thought you had asked
20 what -- what type of information was contained in the
21 scope statement.

22 MS. WIVELL: That's right, I am asking that
23 question.

24 MR. SCHNEIDER: And that's the question I'm
25 objecting to. I think a question of what type of

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1 information was collected, what was the scope of the
2 search, I think, is appropriate, but what -- what was
3 contained in the document I think is not
4 appropriate. And I hope we can get there.

5 MS. WIVELL: Well we're going to be getting
6 to the actual type of documents in a few minutes, but
7 I want to know what other kinds of information,
8 generally, was contained in that document.

9 A. Well it's my understanding that the scope
10 statement contained broad categories of documents
11 that would be searched for. That's my answer.

12 Q. Was there anything else in the scope statement?
13 Without talking about specifics, any other kind of
14 information that was contained in the scope
15 statement?

16 A. Well the scope statement, as I said, contains
17 categories of documents that were being searched for,
18 and that -- that was what it was for.

19 Q. Sir, my question is: What other kinds of
20 information -- well let me start again.

21 Were there other kinds of information contained
22 in the scope statement in addition to the broad
23 categories of documents which were searched for?

24 A. No.

25 Q. So the entire four pages was categories of

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1 documents which were being searched for; is that
2 right?

3 A. That's correct.

4 Q. The entire --

5 There's nothing else in that document other than
6 listings of the broad categories of documents that
7 are being searched for.

8 A. This document was prepared to assist in
9 conducting searches for documents, it was a tool to
10 aid in that process. It was cast in such a way that
11 the documents were to be collected on a very broad
12 basis, and in fact to some extent broader than the
13 actual document requests that plaintiffs provided in
14 the Minnesota case. That was what it was for and
15 that was all that was contained within it.

16 Q. Sir, I move to strike as non-responsive.

17 Was there anything else other than the broad
18 listings of categories of documents contained in the
19 scope statement?

20 A. There may have been page numbers and a title,
21 but essentially the document contains descriptive
22 items referring to categories of documents that were
23 to be collected.

24 Q. Well sir, you have to understand that I am a bit
25 leery of answers which aren't direct in light of the

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1 fact that since the deposition I have been informed
2 that, "Oh, gee, there was a whole 'nother document
3 storage facility that we didn't tell you about." You
4 understand that that has occurred; --

5 MR. SCHNEIDER: Objection.

6 Q. -- right?

7 MR. SVOBODA: Excuse me. I object on the
8 grounds that the question is argumentative and
9 intended to either intimidate or harass the witness
10 and is inappropriate in this context and
11 unnecessary.

12 MS. WIVELL: And I object to your violation
13 of the court's order concerning speaking objections,
14 Mr. Svododa.

15 MR. SVOBODA: As far as I know, Ms. Wivell,
16 a speaking objection is one which suggests the answer
17 to the witness, and there is nothing substantive in
18 my objection, it's all procedural and relates to your
19 inappropriate conduct in this deposition.

20 MS. WIVELL: I object to your violation of
21 the court's order which says objections are to be
22 made with one or a few words, sir.

23 MR. SVOBODA: Well I --

24 MS. WIVELL: Perhaps you better read it
25 again.

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1 MR. SVOBODA: I don't read it that way, and
2 it's impossible to make an objection using one or a
3 few words.

4 BY MS. WIVELL:

5 Q. Sir, you understand that since the last time we
6 met, Brown & Williamson has revealed for the very
7 first time that there was another document storage
8 location that you did not disclose in your testimony
9 when we took that testimony in April of 1997; isn't
10 that true?

11 MR. SCHNEIDER: Object to the form.

12 A. It's my understanding that, as indicated in the
13 interrogatory response, if Brown & Williamson learns
14 of additional information or of other documents which
15 may be responsive, then it would supplement its
16 interrogatory response and provide those documents
17 from time to time. It's also my understanding that
18 late in -- in April or May we did learn of an
19 additional storage facility in Macon, and following
20 on from that a review was undertaken of what was
21 contained therein. And a small number of documents,
22 by and large, in that facility, which was used by a
23 certain number of -- of different departments in
24 Macon -- documents down there are relating to
25 accounting, purchasing and distribution matters and

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1 are not responsive in the Minnesota case -- a small
2 number of documents have been found which may be
3 responsive and will be, you know, supplementally --
4 supplementally added into the -- the depository.
5 Q. Move to strike as non-responsive.

6 Sir, you understand that since I took your
7 deposition as Brown & Williamson's representative on
8 the issue of document collection and production, that
9 after that deposition was taken in April of 1997,
10 Brown & Williamson disclosed for the very first time
11 an additional document storage facility. Isn't that
12 true, sir?

13 MR. SCHNEIDER: Object to the form.

14 A. My understanding is that when we learned that
15 this facility existed and that documents were stored
16 there, and this was only discovered after the -- the
17 first deposition, that's correct.

18 Q. So the answer to my question is yes; isn't it?

19 A. Yes.

20 Q. All right. Now let me understand here. Brown &
21 Williamson had a storage facility in Macon that
22 wasn't revealed in the interrogatory answers or in
23 your document custodian deposition -- I'm sorry.
24 Strike that.

25 So I'm clear here, Brown & Williamson had a

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1 storage facility that it knew about and paid for in
2 Macon, Georgia, that was not revealed in its
3 documents -- in its interrogatory answers or in the
4 deposition that we took of you as Brown &
5 Williamson's representative in April of 1997;
6 correct?

7 MR. SCHNEIDER: Object to the form.

8 A. My response is that during the -- the sweeps of
9 Brown & Williamson, inquiries were made of employees
10 as to where documents were kept. This particular
11 facility was not disclosed in -- at that time, but
12 nevertheless, all the departments which do have
13 documents which are generally relevant, law, research
14 and development, executive departments, their archive
15 files are maintained in Louisville, even in respect
16 of those that moved down to Macon. They continued to
17 keep their archive files in the Louisville storage.

18 So it was an oversight which, upon learning
19 that -- that this facility existed, we have
20 immediately gone back and reviewed and found a small
21 number of -- of documents which may be responsive.

22 But --

23 Q. R&D documents.

24 A. -- in the main they're not.

25 Q. R&D documents; aren't they, sir?

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1 A. It's my understanding that there are a small
2 number of R&D documents in this facility, but that
3 none of those documents are contained in -- will not
4 be provided in this case since they've already been
5 provided or are not responsive.

6 Q. Sir, you can understand why I'm trying to be
7 very careful when we have this kind of problem; can't
8 you, sir?

9 MR. SCHNEIDER: Object to the form.

10 Q. You're trying to be careful, too; aren't you?

11 A. It's my understanding that Brown & Williamson
12 has put in a tremendous effort to comply with the --
13 the document requests in this case and has provided
14 millions of pages, and within the -- the time scales
15 agreed, and continues to supplement where things come
16 up that -- that, you know, as indicated in the -- in
17 the -- in the interrogatory response, we will -- we
18 will supplement if we learn of additional responsive
19 documents.

20 Q. Move to strike as non-responsive.

21 Sir, you can understand why we have to be
22 careful; can't you?

23 MR. SCHNEIDER: Object to the form.

24 A. That's a very broad question. Are you talking
25 about something specifically, or --

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1 Q. Well you can understand why I'm trying to be
2 careful and get precise answers to my questions;
3 can't you, sir?

4 MR. SCHNEIDER: Objection to form.

5 A. I'm here to answer your questions as best I can,
6 yes.

7 Q. Well are you trying to be careful and give
8 precise answers to my questions?

9 A. Yes, I am.

10 Q. All right. Then let me go back to the original
11 one. Was there in the scope statement anything
12 additional other than categories of documents?

13 MR. SCHNEIDER: Objection, asked and
14 answered.

15 A. Well I -- I think I told you earlier that there
16 were page numbers and there was a title. Outside of
17 that, I believe the only elements contained in the
18 document were categories of documents.

19 Q. Were there instructions contained in this
20 document?

21 A. I don't believe there were.

22 Q. Were there definitions contained in this
23 document?

24 A. I understand that there were clarifications.

25 Q. What do you mean by "clarifications?"

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1 A. I believe there were examples.

2 Q. Well sir, you've been saying "I believe, I
3 believe." There were examples; weren't there?

4 A. There were examples.

5 Q. There were clarifications; weren't there, sir?

6 A. If you categorize examples as clarifications,
7 yes.

8 Q. Well sir, you brought up the word, I didn't
9 bring it up.

10 What did you mean by "clarifications?"

11 MR. SCHNEIDER: Object to the form, asked
12 and answered, argumentative.

13 A. I believe -- I believe I explained what
14 clarifications were by indicating that they were like
15 examples.

16 Q. Well what else did you mean by "clarifications?"

17 A. I was referring to elements within the scope
18 document that referenced back to your plaintiff -- to
19 the plaintiff document requests.

20 Q. Are you saying that there were statements of the
21 type "Plaintiffs requested marketing documents?"

22 A. Yes, there were that --

23 There were lists of categories --

24 Q. All right.

25 A. -- with some examples which clarified the nature

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1 of the -- the searches that were to be undertaken.

2 Q. And how did they clarify the nature of the
3 searches to be undertaken?

4 A. Well I'll give you an example. For example,
5 they referenced the specific party that documents may
6 reference which have been requested in the document
7 requests, plaintiff document requests, as an example
8 of the kinds of documents for which searches should
9 be undertaken.

10 Q. All right. Were there any other clarifications,
11 types of clarifications?

12 A. I don't believe so.

13 Q. Were there any examples of what would not be
14 considered responsive?

15 A. I don't believe so.

16 Q. Sir, you've seen the statement. Were there any
17 examples of what would not be considered responsive?

18 MR. SCHNEIDER: Objection to the form,
19 asked and answered.

20 A. I don't believe so.

21 Q. Sir, do you have the statement here? Could you
22 take a look at it and answer my question "yes" or
23 "no," are there any examples of what would be
24 excluded as a responsive document? Please take the
25 time to do so.

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1 MR. SCHNEIDER: Well I object to the form,
2 Ms. Wivell. And I recognize that you're trying to
3 get a sort of general description of the document
4 without going into the specific contents of the
5 document, and I want to try to accommodate that
6 interest with -- with the understanding there's no
7 waiver with respect to our position on the document.

8 I would be willing to let him look at the
9 document to try to answer questions concerning the
10 kind of things you're asking, are there -- are there
11 statements about what's not included, are there
12 statements about what is included, but beyond --

13 I don't want him to get into specific contents
14 to try to protect the court order and protect our
15 respective positions. Is that agreeable?

16 MS. WIVELL: Well I do note for the record
17 that the court specifically said the deponent may
18 review such document to refresh the deponent's memory
19 as to the search parameters, and -- and I think that
20 he can do that without making that statement
21 something that I would ask for.

22 MR. SCHNEIDER: All right.

23 MS. WIVELL: Now if you'd like to give it
24 to me, I would be happy to take it.

25 MR. SCHNEIDER: And let's -- let's have a

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1 further agreement that this document is not going to
2 be on the video camera. All right? Simply for the
3 witness to look at.

4 (Discussion off the stenographic record.)

5 MR. SCHNEIDER: Why don't you take a look
6 at it inside of this file, as a matter of fact.

7 THE WITNESS: Could you repeat your
8 question, please?

9 MS. WIVELL: All right. Well let me
10 restate it.

11 BY MS. WIVELL:

12 Q. Were there examples of the kinds of documents
13 that were not to be included in the document
14 collection and production process?

15 A. There were -- there were not.

16 Q. All right. Let's go back to examples of the
17 kinds of things that were to be included. Are there
18 such examples?

19 A. Yes.

20 Q. Are there any other kinds of what you referred
21 to early as "clarifications" included in the
22 document?

23 A. There are some -- some clauses such as "search
24 for this kind of document only if it contains this
25 kind of information."

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1 Q. And what were the categories of documents that
2 contained those kinds of examples of clarification?

3 MR. SCHNEIDER: Mr. Lowther, to assist, I
4 think you can look at the statement and tell Ms.
5 Wivell how many types of -- how many types of
6 categories had that kind of statement.

7 THE WITNESS: I believe only one.

8 Q. All right. And what was that category?

9 A. The category was related to invoices and
10 contracts of -- with ad agencies.

11 Q. All right. Are there any other kinds of
12 clarifications contained in the scope statement?

13 Please feel free to refresh your recollection
14 with it at all times.

15 MR. SCHNEIDER: Pursuant to our prior
16 understanding; correct?

17 MS. WIVELL: Yes, sir.

18 A. The document contains examples sprinkled
19 liberally throughout.

20 Q. I'm not sure that answers my question, though,
21 sir. Are there --

22 Apart from examples, are there any other kinds
23 of clarifications contained in the scope statement?

24 A. I don't believe there are.

25 Q. Sir, there --

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1 Is your answer that there are none?

2 A. Let me review it carefully.

3 A. I believe I can confirm that the document
4 contains information about categories of documents,
5 with examples of clarification, and there are no
6 other kinds of clarifications included within it.

7 Q. All right. And apart from headings and page
8 numbers, is there anything else in the document?

9 A. No.

10 Q. Then let's talk about the categories of
11 documents. What categories of documents are referred
12 to in the -- in the scope statement?

13 MR. SCHNEIDER: Well, Ms. Wivell, I will
14 object to the question. Again, I think you are
15 trying to ask about the contents of the document
16 without asking about the specific contents, and I
17 recognize and appreciate that; however, at the same
18 time we're trying to give you some general
19 description. I don't want to -- to have him discuss
20 specific words or categories in the document, to be
21 talking about the contents, so I'm trying to figure
22 out how to negotiate through this.

23 He can certainly tell you about the scope of --
24 of the documents that were searched, he can tell you
25 the kind of categories of documents that were

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1 searched, but I don't want to tie that specifically
2 to the content of the scope statement.

3 MS. WIVELL: Well what do you propose,
4 then, I -- I ask this witness? Because I understood
5 that the court was saying I could ask for the
6 contents of the -- I'm sorry, not the contents, but
7 the categories of documents referred to. And perhaps
8 if you can enlighten me about some question that
9 might -- that you might allow him to answer so that
10 we don't have to go back to the court on this, I
11 would appreciate it.

12 MR. SCHNEIDER: All right. Well I -- I
13 think that the court's order indicates that the
14 actual contents of the document are not to be
15 disclosed, but I -- I think that this issue is one
16 that's a mountain out of a hole hill, so I want to
17 try to work through it and get to the bottom of it.

18 One thing that has occurred to me is that he has
19 reviewed Plaintiffs' Exhibit 16, which is -- are
20 the -- your document requests in the case, and he can
21 talk about whether or not the categories that are in
22 your plaintiffs' document requests are covered by the
23 scope of the search and covered by the scope
24 statement. He can do that.

25 MS. WIVELL: I am troubled, because the

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1 court's order says that B&W shall appear for a
2 continuation of its deposition so plaintiffs can ask
3 questions as to the scope for B&W's search for
4 responsive documents, and I -- I don't think that
5 that necessarily does it. Let me see if -- if I can
6 phrase my questions so that you can live with them
7 without disclosing the actual content of the -- of
8 the statement. All right?

9 MR. SCHNEIDER: I think that's -- that's a
10 possibility. You may be able to ask "What is the
11 scope of the search as you understand it?" The
12 witness can be looking at the statement. It can be
13 our understanding that his looking at the statement
14 is not going to result in disclosure of the document,
15 and he can from it tell you the categories that he
16 understands the scope of the search covered.

17 MS. WIVELL: I -- let's try that and see
18 how we go -- how it goes.

19 BY MS. WIVELL:

20 Q. Mr. Lowther, what were the categories of the
21 documents that were included in the scope of the
22 search? And please feel free --

23 MR. SCHNEIDER: And you can look at this
24 document in responding, or -- or any other document
25 you want to refer to.

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1 A. I believe the categories were consistent with
2 those in the document requests. In the -- the scope
3 statement itself the categories were advertising,
4 marketing, promotions and public relations, legal,
5 smoking and health, research, development and
6 engineering, corporate structure, organization, FTC
7 testing and Barclay cigarettes, insurance and health
8 care. I can further tell you that I have reviewed
9 this -- this scope statement against your document
10 requests and satisfied myself that there is a
11 correspondence between the scope of the searches that
12 were undertaken in Brown & Williamson and the
13 document requests prepared by plaintiffs.

14 Q. Anything else, sir, included in the scope of the
15 search?

16 A. It's my understanding that the scope of the
17 search was done on a -- a very broad basis.
18 Categories in -- in this -- the scope document were
19 broader than your document requests, and that indeed
20 Brown & Williamson sought to collect up additional
21 documents in the areas of environmental tobacco smoke
22 and fire-safe cigarettes which were not required for
23 this case, for example.

24 Q. Are there any other categories of documents that
25 were included in the scope of the search?

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1 A. I -- I have given you the full categorization
2 list of -- of what's included in the search.

3 MR. SCHNEIDER: Ms. Wivell, to avoid
4 confusion and to assist in the process, Mr. Lowther
5 has indicated to you broad-heading categories --
6 headings of the -- of the scope. Under each of those
7 headings, of course, there were specific kinds of --
8 of subcategories of information that were searched
9 out, so I want to be sure that you understand that.

10 MS. WIVELL: Well actually, great minds
11 think alike, apparently, because I was just going to
12 ask if there were subheadings included in these
13 various broad categories.

14 A. Indeed there -- there are subheadings.

15 Q. All right. In the advertising category, what
16 subheadings were included in the search?

17 MR. SCHNEIDER: Again, Mr. Lowther, you can
18 ask --

19 You're answering the question about what was --
20 what was the scope of the search, and you can do so
21 with reference to the scope statement. Don't refer
22 to the -- I mean, don't -- in your answers, don't
23 state the content of the scope statement, but use the
24 document to describe for Ms. Wivell the scope of the
25 search.

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- 1 A. Could you repeat your question, please?
- 2 Q. Certainly. Were -- let me ask it this way.
- 3 Were there subheadings included in the scope of the
- 4 search in the advertising category?
- 5 A. Yes, there were.
- 6 Q. What were they?
- 7 A. Well the searches in the advertising area were
- 8 to include documents relating to advertising
- 9 campaigns; documents relating to the decision-making
- 10 process about selecting advertising; documents
- 11 concerning the effect of advertising; documents
- 12 concerning company advertising strategies; documents
- 13 concerning advertising budgets; documents concerning
- 14 markets, target markets; documents concerning
- 15 agreements with advertising companies, invoices;
- 16 documents concerning promotions; and documents
- 17 concerning Roper proposals.
- 18 Q. You said Roper, R-o-p-e-r?
- 19 A. That's correct.
- 20 Q. Were there --
- 21 A. As -- as evidenced -- as referenced in the
- 22 document requests.
- 23 Q. Were there any other subcategories under the
- 24 advertising category?
- 25 A. The general category included some public

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1 relations aspects and some marketing aspects.

2 Q. Were there any other things -- kinds of subjects
3 contained within the advertising category?

4 A. I don't believe so.

5 Q. And your last answer, that you do not believe
6 that there were any other categories, is based on
7 your review of the scope statement; is that right?

8 A. That's correct.

9 Q. Okay. Now you mentioned there was a marketing
10 category. Were there subportions or subsets of
11 documents that were looked for under the marketing
12 category?

13 A. My response is the -- the broad category was
14 advertising, marketing, --

15 Q. Okay.

16 A. -- promotions and public relations, so there
17 were -- there were other subcategories under this
18 relating to some marketing and some public relations
19 documents that were -- were swept for.

20 Q. My apologies. I thought that advertising,
21 marketing, promotions and public relations were
22 separate basic categories. So let me ask this way:
23 Were --

24 Under the -- that broad area of documents which
25 were searched for, were there subheadings under the

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1 marketing category?

2 A. Yes, there were.

3 Q. What were they?

4 A. They're relating to marketing research,

5 including switching studies, other research;

6 documents relating to other research activities;

7 marketing strategy documents; documents relating to

8 marketing firms' decisions regarding tobacco

9 manufacturers.

10 (Discussion off the stenographic record.)

11 Q. Under the broad category of promotion and public

12 relations, were there other subheadings of documents

13 that were searched for?

14 A. I understand that searches were made for press

15 releases regarding smoking and health, public

16 statements regarding smoking and health.

17 Q. Anything else?

18 A. I understand searches were done for public

19 relations releases and information relating to

20 smoking and health, or anything relating to

21 addiction, habituation, dependency.

22 Q. Anything else?

23 A. I don't believe so.

24 Q. All right. Under the legal category, were there

25 subheadings of documents that were searched for?

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1 A. There were --

2 I believe there were subheadings under every
3 broad category that I outlined for you.

4 Q. All right. And what --

5 Under the legal category, what subheadings of
6 documents were searched for?

7 A. Well again, consistent with the document
8 requests of plaintiffs, these were broader
9 subcategories, and included within this were items
10 such as documents relating to labeling and warnings;
11 communications with the Department of Justice on
12 antitrust issues; documents on smoking-and-health
13 litigation; any document regarding submissions to
14 public or government bodies; discussions,
15 recommendations, decisions related to
16 smoking-and-health research by attorneys --
17 discussions by attorneys relating to
18 smoking-and-health research.

19 Q. Anything else?

20 A. I don't think so.

21 Q. What were the subcategories of documents looked
22 for concerning smoking and health under that
23 category?

24 A. Documents relating to the alleged health effects
25 of smoking, smoking initiation, cessation; smoking

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1 causation; any documents on smoking-and-health
2 issues, memos, notes, policies; documents relating to
3 meetings and conferences on smoking and health;
4 documents relating to any diseases claimed to be
5 related to or caused by smoking or the use of other
6 tobacco products; decisions regarding research on
7 smoking and health and advertising; documents
8 relating to industry groups formed for research,
9 advertising, promotions, marketing, public relations;
10 documents relating to third-party smoking-and-health
11 research funding; documents relating to specific
12 entities referenced in the document requests from
13 plaintiffs; documents relating to state and federal
14 political activities and regulations; and documents
15 relating to fire-safe cigarettes.

16 Q. Anything else?

17 A. No.

18 Q. Who were the specific entities that were
19 referred to when you were talking about documents
20 relating to specific entities referenced in the
21 document requests from plaintiffs?

22 A. Well, for example, LS, Inc.

23 Q. Any others that were included?

24 A. LRD.

25 Q. Any others?

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- 1 A. 3i.
- 2 Q. Any others?
- 3 A. Not that have already been included in the other
- 4 category relating to industry groups.
- 5 Q. What were the categories of documents that were
- 6 to be looked for relating to industry groups?
- 7 A. I believe I've told you about the category. If
- 8 your question is what institutions -- documents
- 9 relating to what institutions, --
- 10 Q. Yes, sir.
- 11 A. -- then my response is The Tobacco Institute,
- 12 Tobacco Merchants Association, TIRC, CTR.
- 13 Q. Any others?
- 14 A. There are references to other third parties such
- 15 as AMA, Hazelton, Battelle.
- 16 Q. Any others?
- 17 A. No.
- 18 Q. Have you now talked about all of the
- 19 subcategories of documents that were searched for
- 20 under the smoking-and-health category?
- 21 A. I believe I have.
- 22 Q. All right. Turning to the category of RD&E
- 23 documents, what were the subheadings of categories
- 24 which were searched for from RD&E?
- 25 A. Smoking-and-health research, specifically

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1 relating to biological -- or including documents

2 relating to biological activity.

3 Q. Any others?

4 A. Documents on smoke constituents; documents on

5 non-tobacco ingredients; documents on environmental

6 tobacco smoke; documents on alternative product

7 designs related to allegedly safer cigarettes;

8 documents on addition -- additives and root

9 technology; documents on research and development,

10 budgets and expenditures; documents regarding

11 monitoring delivery or alleged manipulation of

12 nicotine; documents regarding nicotine replacement

13 products; documents regarding nicotine substitutes;

14 documents regarding developments of tobacco plants or

15 other efforts to affect nicotine yields.

16 Q. Were there any other categories under the RD&E?

17 A. No.

18 Q. Sir, was root technology defined in the search?

19 A. I believe it was included, yes.

20 Q. I know it was included, you already mentioned

21 that. Was that defined?

22 A. No, it was not.

23 Q. Were there any definitions included in the --

24 the scope of the search?

25 A. I don't believe there were.

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1 Q. Now have we talked about all of the categories
2 and subcategories of documents that were included in
3 the scope of the search for the RD&E department?

4 A. Yes.

5 Q. You'd mentioned that there was a category of
6 documents broadly defined as "the corporate structure
7 or organization." Do you recall that?

8 A. Yes.

9 Q. All right. What were the subcategories of
10 documents that were included in the scope of the
11 search under that particular broad category?

12 A. Documents relating to corporate structure and
13 organization, document retention; documents relating
14 to policies relating to transfer or storage of
15 records; documents relating to domestic cigarette
16 sales and profits; documents on market shares and
17 brand shares.

18 (Discussion off the stenographic record.)

19 A. Documents from the files of or by or to board of
20 directors, executive committee, presidents; documents
21 relating to company decisions on diversification;
22 documents relating to -- B.A.T. documents relating to
23 organizational structure and communications with
24 company, agreements on financing, management,
25 policies.

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1 (Discussion off the stenographic record.)

2 Q. Were there any other categories under --

3 subcategories under that broad category?

4 A. No.

5 Q. The next broad category that I think you

6 mentioned was FTC testing. Did that include the

7 Barclay cigarette, or was Barclay cigarette a

8 separate category of documents that was searched for?

9 A. It included Barclay cigarettes.

10 Q. Okay. Under the FTC testing and Barclay

11 cigarette category, what subcategories of documents

12 were searched for?

13 A. Documents relating to Barclay and its filter;

14 documents relating to different methods of testing

15 for tar and nicotine; documents relating to tar and

16 nicotine tracking; FTC consent orders.

17 Q. Anything else?

18 A. No.

19 Q. Sir, under the insurance category, were there

20 subheadings of documents to be looked for?

21 A. The category was insurance and health care.

22 Subcategories included insurance policies, and then

23 documents relating to smokers' and non-smokers'

24 health rates, health-insurance rates and health-care

25 costs.

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1 Q. Anything else, sir?

2 A. No.

3 Q. There was a category that you mentioned of
4 documents that were searched for entitled
5 "environmental tobacco." Do you recall that?

6 A. Yes, I do.

7 Q. And what were the subcategories of documents
8 that were searched for under that category?

9 A. It's my understanding that the environmental
10 tobacco smoke issue was the subcategory under the
11 research, development and engineering area.

12 Q. Was there a subheading of documents under the
13 subheading of environmental tobacco that were called
14 to be looked for?

15 A. No.

16 Q. You also mentioned there was a broad category of
17 documents called fire-safe cigarette documents; is
18 that right?

19 MR. SCHNEIDER: I object to the form. Ms.
20 Wivell, what you might be remembering is he said that
21 he thought the scope of the search was as broad as
22 your document requests and that we may have gone a
23 little broader and picked up documents on
24 environmental tobacco and fire safe without saying
25 that they were separate sub-huge categories of your

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1 request. I think that's what you're referring to.

2 MS. WIVELL: Then he can say that if that's
3 the case.

4 A. That's correct.

5 Q. What your counsel just said is correct?

6 A. Yes.

7 Q. Okay. Now we have talked about -- strike that.

8 Have we talked about all of the categories of
9 documents, broad categories of documents which were
10 searched for?

11 A. Yes, we have.

12 Q. Have we talked about all of the subcategories of
13 documents that were searched for?

14 A. Yes, we have.

15 Q. Were there any other categories of documents
16 that were searched for?

17 A. At the time of the active file sweep, I believe
18 that we've talked about all of the categories of
19 documents that were searched for. There may have
20 been supplemental searches in response to additional
21 requests from plaintiffs that came in subsequent to
22 this, but at the time of the sweep of active files
23 these were the categories.

24 Q. Were there other sweeps made after the initial
25 sweep was made?

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1 A. It's my understanding that, as I said, from time
2 to time in response to additional requests for
3 information from plaintiffs, while document sweeps
4 may not have been done, specific inquiries would have
5 been undertaken as a result of which documents may
6 have been provided.

7 Q. All right. And what were the subjects on which
8 the supplemental inquiries were made?

9 A. Oh, I can't recall a specific example at this
10 time.

11 MS. WIVELL: All right. I'd like to take a
12 brief break.

13 THE REPORTER: Off the record, please.

14 (Recess taken.)

15 (Plaintiffs' Exhibit 238 was
16 marked for identification.)

17 BY MS. WIVELL:

18 Q. Sir, I think you told me earlier you have
19 reviewed plaintiffs' requests for production of
20 documents to Brown & Williamson in preparation for
21 your deposition here today; is that right?

22 A. That's correct.

23 Q. Did you review all of plaintiffs' requests for
24 production?

25 A. I believe I did.

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1 Q. All right. I'm going to show you one --

2 there --

3 There were multiple sets; weren't there?

4 A. There were several, yes.

5 Q. Okay. I'm going to show you the one that's been

6 marked as Plaintiffs' Exhibit 16. Do you have it,

7 sir?

8 A. I do.

9 Q. And is Plaintiffs' Exhibit 16 one of the items

10 which you reviewed in preparation for your deposition

11 today?

12 A. Yes, I did.

13 Q. All right. How did you assure yourself that the

14 various subjects of documents that are called for in

15 Exhibit 16 and the other requests for production of

16 documents that plaintiffs made were included in the

17 scope of the search that was made for responsive

18 documents of B&W?

19 A. I inquired of Mr. Willoughby in respect of each

20 of the categories within Exhibit 16 and obtained

21 assurances that they were in fact included. Also,

22 based on the review -- subsequent read of the scope

23 statement, I also satisfied myself that in fact

24 searches have been made in accordance with this

25 document.

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1 Q. All right. Well sir, would you turn to the
2 section that includes Exhibit 37 -- or I'm sorry,
3 request number 37. Do you have it there, sir?

4 A. Yes, I do.

5 Q. Now that calls for, toward the bottom of the
6 page, the production of documents relating to four
7 Minnesota organizations; right?

8 A. That's correct.

9 Q. And they are the Minnesota Candy & Tobacco
10 Association; right?

11 A. Yes.

12 Q. The Minnesota Convenience Stores Association?

13 A. Yes.

14 Q. The Minnesota Grocers Association?

15 A. Yes.

16 Q. And the Minnesota Smokers Rights Coalition;
17 correct?

18 A. That's correct.

19 Q. What did you do to assure yourself that
20 documents in Brown & Williamson's possession relating
21 to these four organizations had been produced?

22 A. Well it's my understanding that all documents
23 relating to smoking and health, advertising,
24 promotion and marketing exchanged or shared between
25 my company and any of these following entities would

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1 have been broadly collected up and swept, and either
2 categories of documents included in this scope
3 statement. In addition, it's my understanding that
4 the attorneys and paralegals that conducted the sweep
5 were fully trained on the contents of plaintiffs'
6 document requests and would have collected up any
7 documents that were likely to be responsive relating
8 to these organizations as part of that process. And
9 indeed, when I interviewed Mr. Willoughby, he assured
10 me that that would have been the case.

11 Q. Did you go through each one of plaintiffs'
12 document requests and ask Mr. Willoughby individually
13 whether all of the documents had been -- or all of
14 those categories of documents had been swept up?

15 A. Yes, I did.

16 Q. So you sat down with Mr. Willoughby and each one
17 of plaintiffs' document requests and asked him
18 whether the categories of documents had been swept;
19 is that right?

20 A. My question was would these documents have been
21 included in -- included of the sweep, yes.

22 Q. So you specifically asked Mr. Willoughby whether
23 documents relating to the Minnesota Candy & Tobacco
24 Association have been produced.

25 A. In fact, I believe I did.

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1 Q. All right. You used --

2 You used those particular words; right?

3 A. I don't know that I used those exact words, but

4 I used words like that, yes.

5 Q. Well I'm just trying to determine how detailed

6 your preparation was for this deposition and whether

7 you said, "Well, were all the things in plaintiffs'

8 requests for production swept, or did you go through

9 category by category, item by item?

10 A. I can tell you that I went through category by

11 category, item by item. I did not necessarily ask a

12 specific question relating to every one if it was

13 clear that that category had been swept for in the

14 nature of a general category of documents. For

15 example, there are specific requests for any

16 documents pertaining to smoking and disease A, and

17 then another one relating to smoking and disease B,

18 disease C, and so on, and I did not necessarily ask

19 three questions of Mr. Willoughby, but I obtained

20 satisfaction that documents were swept in each of

21 those categories.

22 Q. All right. Could you take a look at category

23 24. Would you read category 24 into the record,

24 please, as to which documents it requests.

25 A. Category 24 states, "All documents relating or

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1 referring to the issue of health insurance rates for
2 smokers or for smokers versus non-smokers."

3 Q. All right. And did you assure yourself that all
4 documents relating to that category had been swept?

5 A. My inquiry was along the lines of were -- were
6 documents in this category searched for as part of
7 the sweep, and I obtained assurances that that was
8 the case.

9 Q. All right. Do you see another category on that
10 page that asks for health-care costs, all documents
11 relating to health-care costs for smokers?

12 A. Category 25.

13 Q. Could you read that, please.

14 A. Category 25 states, "All documents relating or
15 referring to health-care costs for smokers or for
16 smokers versus non-smokers.

17 Q. And how did you assure yourself that all
18 documents in Brown & Williamson's possession relating
19 to that request had been collected?

20 A. As I said before, I inquired as to whether
21 documents of this nature were included in the sweep.
22 Because of my understanding of the nature of the
23 sweep, clearly there are no guarantees that we
24 collected every single document in this category, but
25 with a huge amount of effort and I think a very

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1 thorough process, every effort was made to find these
2 documents and to produce them if they were responsive
3 and not privileged.

4 Q. All right. Sir, you remember that there are
5 requests from plaintiffs concerning lobbying
6 documents; right?

7 A. I believe that's right.

8 Q. All right. I did not hear you mention lobbying
9 when you talked to me about the scope of the search.
10 Was lobbying -- were lobbying -- strike that.

11 Were lobbying documents searched for?

12 A. It's my understanding that they were.

13 Q. Under what category did they fall? And I'm
14 referring to those categories that you discussed
15 while you were refreshing your recollection.

16 A. Well my response is that -- that document
17 searches were undertaken based on the plaintiffs'
18 document requests. The scope statement was prepared
19 as an aid to those who were doing the searches and as
20 an aid to Brown & Williamson employees who were being
21 interviewed about where they kept their files. In
22 respect of lobbying activities, the scope statement
23 clearly included that -- that category under a broad
24 category of state and federal political and
25 regulatory activities.

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1 Q. I'm sorry, I --

2 Sir, I don't remember you giving me a category,
3 and I may have just missed it, when you were
4 discussing the scope statement of state and federal
5 political and regulatory activities.

6 MR. SCHNEIDER: Object to the form. You
7 mean the scope of the search.

8 MS. WIVELL: Yes, sir.

9 MR. SCHNEIDER: You might look at your
10 notes under smoking -- the smoking-and-health
11 category. I don't know whether it's in your notes or
12 not.

13 MS. WIVELL: That's why I'm saying I may
14 have missed it, and I'm trying to find out under what
15 category it would fall.

16 THE WITNESS: I believe it was the
17 smoking-and-health category.

18 Q. So it's your testimony that lobbying documents
19 were collected; right?

20 A. I believe they were.

21 Q. All right. Sir, showing you what's been marked
22 as Exhibit 238, do you recognize that?

23 A. Yes, I do.

24 Q. What is it?

25 A. It's a letter to yourself from King & Spalding

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1 dated May 6.

2 MR. FRIBLEY: Marti, for the record, I'm
3 just looking under the -- opposite the time entry of
4 44:48, he did list documents relating to state and
5 federal political activities and regulations right
6 before he listed documents relating to fire-safe
7 cigarettes.

8 MS. WIVELL: Which is why I said I may have
9 missed it, so --

10 MR. WILLOUGHBY: Sure.

11 BY MS. WIVELL:

12 Q. Go ahead, Mr. Lowther, you were identifying
13 Exhibit --

14 THE REPORTER: 238.

15 A. I believe I did that.

16 MR. SCHNEIDER: 238.

17 A. 238 is a letter to yourself from King & Spalding
18 dated May the 6th, 1997.

19 Q. Have you seen it before?

20 A. Yes, I have.

21 Q. Did you review it in preparation for your
22 deposition today?

23 A. Yes, I did.

24 Q. Did you participate in creating this document
25 that's Exhibit 238?

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- 1 A. Yes, I did.
- 2 Q. What was your part in creating this document?
- 3 A. The document was put together by King & Spalding
- 4 following discussions with me.
- 5 Q. What kind of discussions took place between you
- 6 and King & Spalding. Generally, not asking for
- 7 specifics.
- 8 A. The questions concerning my -- my deposition and
- 9 those issues that I had undertaken that we would
- 10 follow up and reply to you on.
- 11 Q. All right. And indeed, is this the report that
- 12 was generated in response to the questions that you
- 13 agreed to report back on at your deposition in April
- 14 of this year?
- 15 A. Yes, it is.
- 16 Q. All right. Have you reviewed it for accuracy
- 17 and completeness?
- 18 A. Yes, I have.
- 19 Q. All right. And do you attest to accuracy of the
- 20 answers contained in this report, Exhibit 238?
- 21 A. I believe they're correct.
- 22 Q. What did you do to assure yourself that they
- 23 were correct?
- 24 A. Well I -- I had discussions with outside counsel
- 25 on these issues.

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1 Q. All right. Is it your testimony that all
2 documents responsive to plaintiffs' document requests
3 have been produced today by Brown & Williamson?

4 A. I believe that in the February 11th, 1997
5 response, Brown & Williamson provided all documents
6 that it identified as responsive by the end of 1996,
7 but that it said in its supp -- in its response that
8 if further documents came to its attention, it would
9 make -- make them available if they were not
10 privileged and were found to be responsive either
11 when they became -- as and when they were known
12 about.

13 Q. All right. Well I move to strike as
14 non-responsive. My question is simply this. I'll
15 rephrase it to maybe help you a little bit.

16 Are there documents responsive to plaintiffs'
17 requests that Brown & Williamson knows about today
18 which have not yet been produced to plaintiffs?

19 A. It is my understanding that there are activities
20 under way to establish whether any such documents
21 exist, and that further documents might be provided
22 in this case either because, as part of the
23 completion of the privilege-logs review some
24 documents are deemed not to be privileged or
25 privilege will not be claimed on them and they will

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1 be made available, or in respect of one or two
2 categories such as the -- the Macon storage room that
3 the company became aware of where a small number of
4 documents may be additionally provided, and one or
5 two other areas.

6 Q. So the answer to my question is yes, there are
7 responsive documents known to B&W today which have
8 not been produced to plaintiffs.

9 A. It's my understanding that work is under way to
10 establish whether, indeed, there are some responsive
11 documents. And some are -- some have been -- have
12 been found which are going to be provided to you.

13 Q. So that there are responsive documents which we
14 haven't received as of today; correct?

15 A. There are some.

16 Q. All right. When will we get them?

17 A. I think every effort is being made to provide
18 them as soon as possible.

19 Q. Well what is "as soon as possible?"

20 A. Every effort is being made to provide them as
21 soon as is practical and reasonable.

22 Q. Well they --

23 You know that they were to have been provided by
24 December 31st of 1996; correct? You're aware of that
25 court order; right?

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1 MR. SCHNEIDER: Object to the form.

2 A. It's my understanding that Brown & Williamson
3 provided all documents identified as responsive by
4 December thirty -- December the 31st, 1996.

5 Q. Are we going to get them in a week?

6 A. I don't know when you'll get them.

7 Q. A month? Are we going to get them in a month?

8 A. I don't know.

9 Q. How about by January 19th, 1998, are we going to
10 get them then?

11 A. I would expect.

12 MR. SCHNEIDER: Object to the form.

13 Q. Well have you spoken with counsel about their
14 best estimates about when we might expect these
15 remaining responsive documents that Brown &
16 Williamson knows about?

17 A. I haven't asked that question.

18 Q. All right. Why don't you go out --

19 Why don't we go off the record and you ask, and
20 they can give me -- or you can on B&W's behalf give
21 me a best estimate so we can let the court know.

22 THE REPORTER: Off the record, please.

23 (Discussion off the record.)

24 BY MS. WIVELL:

25 Q. Sir, I asked you before we took a break whether

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1 you had a best estimate about when plaintiffs might
2 expect to receive the remaining responsive documents
3 that Brown & Williamson knows about that haven't been
4 produced. Now during the break did you talk with the
5 four attorneys from Brown & Williamson that are here
6 today about the answer to that question?

7 A. Yes, I did, and I understand that as and when
8 documents are identified as responsive, they will be
9 provided, and every reasonable effort is being made
10 to -- to do this, and alongside a lot of other issues
11 that need to be addressed, and that every effort is
12 being made such that we can target getting this done
13 within a month.

14 Q. How many documents does Brown & Williamson know
15 about that are responsive that haven't been produced
16 to plaintiffs as of today?

17 A. Well it's my understanding that very few are
18 known about as being responsive. There are some
19 documents that -- in -- in archives that Brown &
20 Williamson has gone back again to check, and there
21 may be, you know, as many as -- as 20 boxes or so
22 that -- that come out from that.

23 Q. Well of those that are known today to be
24 responsive, you said there were very few. What do
25 you consider to be very few?

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1 A. I think no more than several hundred pages.

2 Q. Why can't we have them by Tuesday?

3 MR. SCHNEIDER: Object to the form.

4 A. Well it's my understanding that there's a lot of
5 effort being provided to meet and provide privilege
6 logs by the deadline, and that, you know, every
7 effort -- every reasonable effort is being made to
8 get documents that are considered responsive and not
9 privileged to you with -- as soon as possible.

10 Q. So you can't tell us whether, by the time we go
11 into court on Tuesday to report on the status of
12 these matters to the court, you can't guarantee that
13 we'll have those few hundred pages; is that right?

14 MR. SCHNEIDER: Objection to form.

15 A. I -- I am not --

16 I don't know whether you'll have those documents
17 by Tuesday or not.

18 Q. All right. Sir, could you turn to the page of
19 Exhibit 238 that concerns question 26.

20 A. I've done so.

21 Q. All right. Sir, that was a question that I
22 asked you when I was talking to you about the
23 document collection/production of documents that were
24 collected under the scope of this search from your
25 own department; right?

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- 1 A. That's correct.
- 2 Q. By the way, Martha Thomas is now in your
- 3 department; isn't she?
- 4 A. No, she is not.
- 5 Q. She was in your department; wasn't she?
- 6 A. She was.
- 7 Q. All right. When did she move out of your
- 8 department?
- 9 A. I think it was in April or May 1995.
- 10 Q. All right. What role did she have in your
- 11 department?
- 12 A. She was an administrative assistant.
- 13 Q. To whom?
- 14 A. To me and my staff --
- 15 Q. All right.
- 16 A. -- within the audit department.
- 17 Q. Okay. Now --
- 18 And that's the person who used to be Jeffery
- 19 Wigand's secretary; right?
- 20 A. She was at one time, that's correct.
- 21 Q. Okay. Getting back to question 26, it says,
- 22 "How many documents were collected from Richard
- 23 Lowther's department;" right?
- 24 A. That's correct.
- 25 Q. And the answer is 12 boxes; right?

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1 A. That's correct.

2 Q. Can you explain to me, sir, why only a total of
3 35 documents that have your name on them have been
4 produced to the plaintiffs in -- in this litigation?

5 A. It's my understanding that, as I said earlier,
6 the documents swept from archives and from active
7 files of Brown & Williamson numbered in excess of 11
8 million. Only four million were produced -- or more
9 than four million were produced, but certainly not 11
10 million, and one of the reasons for that is that the
11 collection of documents was on a much more broad
12 basis than documents required -- requested by
13 plaintiffs. So large numbers of those were not
14 responsive and were not provided, and that may have
15 been the case for documents that were collected from
16 my department.

17 And the other -- the other, I think, is that
18 documents may have been collected from my department
19 which didn't reference my name but were in my files.

20 (Plaintiffs' Exhibits 239 through 242
21 were marked for identification.)

22 BY MS. WIVELL:

23 Q. Sir, I have just handed you Exhibits 239 through
24 242, and I'd like to go through, for the record, and
25 identify each one of them.

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- 1 Would you look at Exhibit 239. It is a document
2 Bates numbered 282015671; correct?
- 3 A. Yes.
- 4 Q. All right. And this is a document from your
5 files; isn't it?
- 6 A. I don't know whether this document was produced
7 from my files or not.
- 8 Q. All right.
- 9 A. Certainly it -- it is a document which -- a copy
10 of which I do have or would have had in my files.
- 11 Q. And it's also stamped "RISK MANAGEMENT
12 DEPARTMENT;" isn't it, sir?
- 13 A. Yes, it is.
- 14 Q. All right. And for the record, it is a letter
15 dated February 7th, 1995 to you from Daniel --
- 16 And how do you say his last name?
- 17 A. I believe it's Pekera.
- 18 Q. -- Pekera, the manager of risk management and
19 environmental affairs at American Brands, Inc.;
- 20 correct?
- 21 A. Yes, it is.
- 22 Q. All right. You received this letter and -- and
23 the attachments in the ordinary course of business as
24 Brown & Williamson's risk manager; correct?
- 25 A. That's correct.

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1 Q. Let's go on to the next document, Exhibit 240.
2 For the record, that's a Bates -- a doc -- document
3 Bates numbered 173000306; right?
4 A. Yes, it is.
5 Q. It is a letter from Daniel Pekera, manager, risk
6 management and environmental affairs, American
7 Brands, Inc., to you, dated April 4th, 1995; correct?
8 A. That's right.
9 Q. All right. And you received it as part of your
10 activities as risk manager -- risk manager for Brown
11 & Williamson.
12 A. That's correct.
13 Q. Now attached to it is a letter Bates numbered
14 173000307 dated March 15th, 1995 that you wrote;
15 isn't that true?
16 A. That's correct.
17 Q. You wrote it to Daniel E. Barton, Gibbs Hartley
18 Cooper North America Limited.
19 A. Yes.
20 Q. And you sent it, along with the attachment,
21 which are Bates numbered 173000306 through 346, as
22 part of your regular business activities as business
23 manager for Brown & Williamson; correct?
24 A. Well the Bates numbers are 173000308 through
25 173000346.

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1 Q. All right. And you sent that letter as part of
2 your activities as risk manager for Brown &
3 Williamson; correct?

4 A. That's correct.

5 Q. Let's identify Exhibit 241. That is a document
6 Bates numbered 173000361 through 371; correct?

7 (Coughing) Pardon me.

8 A. That's correct.

9 Q. All right. Would you identify this document for
10 the record.

11 A. Well it's a letter faxed to Mark Berry at
12 Johnson & Higgins from me, with some extracts from
13 the American Brands product liability policy
14 attached.

15 Q. All right. The letter is the second page of
16 Exhibit 241; isn't it?

17 A. That's correct.

18 Q. And the attachments comprise the remaining pages
19 that begin Bates number 363 through 371; right?

20 A. That's correct.

21 Q. What's the first page, sir?

22 A. The first page is a file note to myself in
23 connection with various policies that American
24 Tobacco -- or American Brands had for American
25 Tobacco, and some calculations on the premium

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1 amounts.

2 Q. All right. Did you write or make the notes that
3 appear in the handwritten portion on page 361, the
4 first page of Exhibit 241?

5 A. Yes, I did.

6 Q. That's your handwriting?

7 A. Yes, it is.

8 Q. Okay. Sir, could we turn to Exhibit 242.

9 That's, for the record, Bates number 173000229;
10 correct?

11 A. Yes, it is.

12 Q. That is a letter, July 3rd, 1995, from you to
13 Daniel E. Barton at Gibbs Hartley Cooper North
14 America Limited; correct?

15 A. That's correct.

16 Q. It's regarding "American Brands Tobacco Products
17 Liability Insurance."

18 A. Yes.

19 MS. WIVELL: Have I misstated something?
20 Oh, all right.

21 MR. SCHNEIDER: This is not -- this is not
22 a document that you designated, but we'll see where
23 we go.

24 MS. WIVELL: All right. I'm sorry, I
25 thought it was. I beg your pardon.

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1 Q. These documents all concern insurance provided
2 covering the American Tobacco Company; right?

3 A. That's correct.

4 Q. Now sir, you were communicating in Exhibit 239
5 and 240 with representatives of American Brands,
6 Inc.; weren't you, sir?

7 MR. SCHNEIDER: Object to the form and note
8 that this is outside the scope of today's
9 deposition. If you're going to --

10 If this relates in some manner to the scope of
11 the search, --

12 MS. WIVELL: We're getting there.

13 MR. SCHNEIDER: -- then we can discuss it.

14 All right.

15 MS. WIVELL: We're getting there.

16 MR. SCHNEIDER: Go ahead.

17 I'm sorry, I don't know whether you remember the
18 question.

19 THE WITNESS: Well could you repeat it,
20 please?

21 MS. WIVELL: Certainly.

22 Q. In Exhibits 239 and 240 you were communicating
23 with American Brands, Inc. concerning liability
24 insurance for American Tobacco Company; right?

25 A. I was in receipt of communication from American

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1 Brands concerning that matter, yes.

2 Q. All right. You had telephone communications
3 with these people at American Brands, too; didn't
4 you, sir?

5 A. Yes.

6 Q. Regarding this issue?

7 A. Yes, I did.

8 Q. All right. Did you make notes of those
9 communications?

10 A. Yes, I did. I mean one -- one such note is
11 included in -- in these exhibits.

12 Q. In addition --

13 And that is the note that's appearing on the
14 front of Exhibit 361; correct?

15 A. That's --

16 MR. SCHNEIDER: Objection, that's 241,
17 Exhibit 241.

18 MS. WIVELL: Thank you. Let me restate the
19 question.

20 Q. And the note you made of these communications,
21 one such example is the first page of Exhibit 241;
22 right?

23 A. That's correct.

24 Q. Where are the rest of the notes, sir?

25 MR. SCHNEIDER: Objection to form.

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1 A. I don't know that I made other notes about my
2 communications with them.

3 Q. Well sir, I asked you if you made notes. Are
4 you telling me that the only note you made was the
5 first page of Exhibit 241?

6 A. It's likely that that may have been the only
7 notes. I can't confirm that it was the only notes.

8 Q. All right. Did you make notes of the telephone
9 conversations you had with American Brands risk
10 management department concerning the issue of
11 American Tobacco Company insurance?

12 A. I may have from time to time.

13 Q. Do you remember doing so?

14 A. The only one I recall making is this one in
15 Exhibit 241.

16 Q. I understand that that may be the only one you
17 have a specific recollection of, so let me ask this
18 question this way: Do you typically make notes of
19 the telephone conversations you engage in?

20 A. Well clearly I -- I do, yes.

21 Q. All right. Did you make notes of the telephone
22 conversations that you engaged in -- no, strike that.

23 To the best of your recollection, you would have
24 made notes of the telephone conversations you engaged
25 in when you were discussing risk management -- you --

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1 I'm sorry. Strike that.

2 To the best of your ability, you remember making
3 notes of telephone conversations that you had
4 concerning American Tobacco Company insurance when
5 you were discussing that issue with American Brands
6 risk management; correct?

7 MR. SCHNEIDER: Object to the form.

8 A. I believe I said I don't recall making any
9 notes. I undoubtedly would have recorded telephone
10 numbers and prompts to myself to call somebody back
11 or return calls and those kinds of things. I don't
12 recall any specific notes that I made about the
13 substance of our conversations other than this one.

14 Q. Well you had substantial conversations with
15 American Brands risk management department over the
16 issue of American Tobacco Company insurance; didn't
17 you?

18 A. Yes.

19 Q. All right. And typically you would have made
20 notes of those kinds of conversations; wouldn't you,
21 sir?

22 A. I would say that I would keep notes to -- to
23 help me recollect the key points.

24 Q. All right.

25 A. But I wouldn't necessarily document each and

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1 every conversation that I have with American Brands
2 in this matter.

3 Q. Sir, if you take a look at Exhibit 240, there
4 are attachments beginning at page 308, Bates numbered
5 page 308; correct?

6 A. Yes.

7 Q. Now you refer to those enclosures -- in --
8 sorry.

9 You refer to those attachments in your letter of
10 March 15th, 1995 to Daniel Barton; right?

11 A. Yes.

12 Q. You refer to them as a bordeaux. Am I
13 pronouncing that correct?

14 A. Bordereau.

15 Q. A bordereau. All right. What is a bordereau?

16 A. It's a -- a report filed to an insurance company
17 in terms of the -- the policy requirements to advise
18 them -- keep them informed from time to time of
19 matters relevant to that policy.

20 Q. Well the American Tobacco Company liability
21 policy that these documents concern, was it a claims-
22 made or a notice policy?

23 A. Could you repeat the question, please.

24 Q. Was --

25 MR. SCHNEIDER: I object to the form,

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1 outside the scope.

2 Q. Was it a claims-made or a notice policy?

3 A. I believe it was a claims-made policy.

4 Q. All right. And what does that mean, sir?

5 A. It's my understanding that it would mean that
6 the insurance would respond based on the time that a
7 claim was made rather than necessarily on the date
8 that liability first crystallized.

9 Q. All right. And I made a mistake. The kind of
10 policy that may -- that is referred to as an
11 occurrence policy is the latter kind of policy; isn't
12 it?

13 A. Right.

14 Q. All right. Now you put together notices for the
15 American Tobacco Company insurance policy, and that
16 is what is actually attached at page 308 to 346;
17 correct?

18 MR. SCHNEIDER: Object to the form.

19 A. I -- I can tell you that this was just a matter
20 of reporting current liability cases filed against
21 the company to the insurer -- the insurance company
22 on a regular basis, and the -- the procedure was
23 simply to have the lawyers prepare such summaries and
24 help us to -- to provide that information.

25 Q. Were the lawyers involved in preparing these

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1 documents that are the attachments, Bates numbered
2 308 through 346 of Exhibit 240?

3 A. Yes, they were.

4 Q. Did you receive reports from those lawyers?

5 A. Yes, I did.

6 Q. Where are they?

7 A. These are those reports.

8 Q. Do you know whether they made notes that were
9 rough drafts of these reports?

10 MR. SCHNEIDER: I object to the form.

11 A. I do not.

12 Q. All right. Sir, in -- let me back up again.

13 Why were you dealing with American Brands, Inc.
14 about American Tobacco Company insurance?

15 A. American Tobacco was acquired from American
16 Brands. At the time of the acquisition we took steps
17 to cancel existing insurances for American Tobacco
18 and to incorporate their insurance issues within
19 Brown & Williamson's policies, and I communicated
20 with American Brands in the course of doing that.

21 Q. Well, why American Brands and not American
22 Tobacco?

23 A. It's my understanding that American Brands is
24 the holding company of American -- for example, it's
25 as a holding company with a number of different

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1 subsidiaries that would take out insurance that
2 covered itself and its subsidiaries. And, for
3 example, the tobacco products liability insurance
4 policy would have provided some cover to Gallaher,
5 which was a subsidiary of American Brands, in
6 addition to American Tobacco.

7 Q. Is that why you made the reference to cover for
8 Gallahers that appears on Exhibit 241?

9 A. That's correct.

10 Q. What is "cover?"

11 MR. SCHNEIDER: Object to the form, outside
12 the scope.

13 A. I was referring to the insurance -- the -- the
14 availability of insurance.

15 Q. So is --

16 Is it your testimony that if B&W cancelled the
17 policy that provided coverage -- insurance coverage
18 to American Tobacco Company, that Gallahers would
19 also lose their coverage?

20 MR. SCHNEIDER: Object to the form, outside
21 the scope.

22 A. It's my understanding that B&W did not cancel
23 this policy and was not able to cancel this policy.

24 Q. Well sir, I -- my question has to do with: Is
25 it your testimony that if B&W cancelled the policy,

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1 that if it had happened, that insurance coverage to
2 Gallahers would end?

3 MR. SCHNEIDER: Same objection.

4 A. My response is that this policy was an American
5 Brands policy, not a Brown & Williamson policy; we --
6 we were not able to cancel it. If American Brands
7 had cancelled it, it's my understanding that they had
8 bought this insurance both to cover Gallaher and
9 American Tobacco. If it were cancelled, then it
10 would have affected both companies.

11 Q. And we're talking about insurance for coverage
12 in the United States; correct?

13 A. I believe that's correct.

14 Q. All right. Well let me ask you this to tie this
15 up: Did, in its search for relevant, responsive
16 documents, Brown & Williamson search the files of
17 American Brands, Inc.?

18 MR. SCHNEIDER: Object to the form, asked
19 and answered in prior depositions.

20 A. No, they did not.

21 Q. In trying to determine whether there were
22 responsive, non-privileged documents in this case,
23 did Brown & Williamson or its counsel search
24 Gallahers files?

25 MR. SCHNEIDER: Same objection.

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1 A. No, they did not.

2 Q. In this case, has any lawyer searched American
3 Brands files for potentially responsive,
4 non-privileged documents?

5 MR. SCHNEIDER: Same objection.

6 A. I don't believe they have.

7 Q. Sir -- and I'm not talking just about Brown &
8 Williamson, I'm talking about American Tobacco
9 Company which Brown & Williamson has now had
10 incorporated into it. Is it your testimony as Brown
11 & Williamson's representative that no file search has
12 been done of American Brands, Inc.?

13 MR. SCHNEIDER: Object to the form, outside
14 the scope. Mr. Lowther is not designated to testify
15 with respect to the collection of American documents
16 outside of Brown & Williamson's files. There has
17 been a prior deposition on that topic.

18 A. I'm not prepared to answer it, I don't know, but
19 I don't believe that a search was done of American
20 Brands.

21 Q. What other subjects other than insurance did
22 Brown & Williamson deal with American Brands on
23 concerning the acquisition or merger of American
24 Tobacco Company?

25 MR. SCHNEIDER: Objection, outside the

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1 scope.

2 A. Well, that's a very broad issue. I mean it --
3 it -- it was a major acquisition. There was a due
4 diligence review. Inquiries were made in a whole
5 host of areas for us to understand the business
6 operations of American Tobacco. That's -- no
7 limitation, almost on --

8 Q. All right. Well you know from your own personal
9 dealings, sir, that there are American Tobacco
10 Company documents in American Brands' files; right?

11 MR. SCHNEIDER: Object to the form, outside
12 the scope.

13 A. I can speculate. As a holding company they
14 would have -- I mean they obviously had
15 communications with American Tobacco, --

16 Q. All right.

17 A. -- fairly extensively.

18 Q. Well, sir, you know from your own personal
19 experience that they have American Tobacco
20 Company-related documents in their files; don't you?

21 MR. SCHNEIDER: Object to the form.

22 A. Yes, I do.

23 Q. And you know that because you sent letters and
24 received letters from American Brands, Inc. risk
25 management and environmental affairs department;

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1 right?

2 MR. SCHNEIDER: Object to the form,
3 misleading.

4 A. I received letters from American Brands, yes.

5 Q. All right. You also sent letters to American
6 Brands; didn't you?

7 A. Yes, I did.

8 Q. Yes.

9 About what subjects, sir?

10 A. My communications with American Brands were
11 relating to insurance.

12 Q. Are there other documents from that 12 boxes
13 that were taken out of your office that are
14 responsive and not privileged that haven't been yet
15 received by the plaintiffs?

16 MR. SCHNEIDER: Object to the form. Ms.
17 Wivell, it's the department, not his office.

18 MS. WIVELL: I'll rephrase the question.

19 Q. Are there other documents from that 12 boxes
20 that were taken out of your department that are
21 responsive and non-privileged that haven't yet been
22 received by the plaintiffs?

23 A. It's my understanding that in respect of these
24 boxes that were taken from my office and my
25 department, they would have been reviewed on a

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1 document-by-document basis as I described in my
2 earlier deposition, and if any were considered
3 responsive and not privileged, they would have been
4 provided.

5 Q. Move to strike as non-responsive.

6 Sir, are there any documents from your own
7 department from among those 12 boxes that have not
8 been produced to plaintiffs which are responsive and
9 non-privileged?

10 MR. SCHNEIDER: Objection to the form,
11 asked and answered.

12 A. I don't believe there are.

13 Q. And what have you done to come to that answer?

14 A. Well I -- I --

15 As part of preparing for the first deposition on
16 document production, I understood the procedures that
17 were used to comply with your discovery requests. I
18 understand that every effort was made to provide all
19 documents identified as responsive by the end of the
20 year. I see evidence that some have been provided.
21 I think that's sufficient to allow me that assurance.

22 (Plaintiffs' Exhibits 243 and 244
23 were marked for identification.)

24 BY MS. WIVELL:

25 Q. Sir, showing you what's been marked as

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1 Plaintiffs' Exhibit 243, this is a document Bates
2 numbered 187000056; correct?
3 A. With attachments, yes.
4 Q. All right. And then the cover sheet is a fax --
5 I'm sorry. Start again.
6 The cover sheet is a telex cover page; is that
7 right, sir?
8 A. I believe so, yes.
9 Q. Directed to you from Tony Harvey; right?
10 A. Yes.
11 Q. Who is Tony Harvey?
12 A. He's a -- a broker that is employed by Willis
13 Corroon in London.
14 Q. And what is Willis Corroon?
15 A. Willis Corroon is an insurance broker for B.A.T.
16 Industries.
17 Q. All right. And the subject of this telex is
18 B.A.T. directors' and officers' liability policy;
19 correct?
20 A. B.A.T., yes.
21 Q. All right. And what does "B.A.T." refer to
22 here, sir?
23 A. I believe it's referring to B.A.T. Industries.
24 Q. All right. Now there is handwritten comment on
25 the front of this sheet. Was that there when you

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1 received it?

2 A. Yes, I believe so.

3 Q. And you did receive this and the attachment in
4 the ordinary course of your business at Brown &
5 Williamson; right?

6 A. Yes.

7 Q. At or about the time that these documents are
8 dated; right?

9 A. I believe so.

10 Q. Now if you turn to the next remaining pages of
11 Exhibit 243, what are they?

12 A. These are contents of a letter from Tony Harvey
13 to me documenting some discussions that we had had
14 relating to directors' and officers' liability in
15 Louisville earlier.

16 Q. All right. You had had a meeting in Louisville
17 with Tony Harvey to discuss the B.A.T. directors' and
18 officers' liability policy; is that right?

19 A. That's correct.

20 Q. Sir, did you have in your possession in
21 Louisville a copy of the B.A.T. directors' and
22 officers' liability policy?

23 A. Yes, I believe we did.

24 Q. Why hasn't it been produced to the plaintiffs?

25 MR. SCHNEIDER: Object to the form.

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1 A. I don't know that it has not been produced.

2 Q. Well I looked for it and I couldn't find it.

3 Now it could be that I made a mistake, but do you
4 know if the B.A.T. directors' and officers' liability
5 policy has been produced to the plaintiffs?

6 A. I do not know.

7 Q. Do you know if it was amongst the 12 boxes of
8 documents that were taken from your department?

9 A. I do not know.

10 Q. It clearly would have been responsive to
11 plaintiffs' document requests; wouldn't it, sir?

12 MR. SCHNEIDER: Object to the form,
13 misleading.

14 A. I don't know that it would have been
15 responsive. It would have been my understanding that
16 in the context of the broad sweep that would have
17 been provided it should have been collected, and then
18 would have been reviewed for responsiveness and may
19 or may not have been deemed so responsive.

20 Q. All right. Well sir, can you go back to --

21 Can you refresh your recollection about whether
22 insurance policies or -- or I should say and/or
23 documents relating to Brown & Williamson's
24 relationship with B.A.T. Industries, BAT Co, BATUKE,
25 were called for by plaintiffs' discovery requests?

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1 MS. WIVELL: Why don't we go off the record
2 while we do this.

3 THE REPORTER: Off the record, please.

4 (Discussion off the record.)

5 BY MS. WIVELL:

6 Q. All right. Let's go back on the record, let me
7 ask the question again. I'll rephrase it for you.

8 Were documents relating to Brown & Williamson's
9 relationship with B.A.T. Industries, BAT Co or BATUKE
10 called for in the scope of the search?

11 A. Yes, it's my understanding that they were.

12 Q. All right. And clearly, if you had in your
13 department's files a copy of the B.A.T. directors'
14 and officers' liability policy, that would have been
15 responsive; correct?

16 MR. SCHNEIDER: Object to the form.

17 A. It's my understanding that it would have been
18 collected up as part of the scope of the searches
19 that were done within Brown & Williamson, and it
20 would have been reviewed by outside counsel to
21 determine whether, indeed, it was responsive, and if
22 it had been determined to be responsive and not
23 privileged, it would have been provided.

24 Q. All right. Turning to page 244, this is a fax
25 cover sheet which --

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1 THE REPORTER: Exhibit.

2 MS. WIVELL: I'm sorry, strike that.

3 Q. Turning to Exhibit 244, this is a fax cover
4 sheet with a note that you received from B.A.T.
5 Industries; isn't it, sir?

6 A. That's correct.

7 Q. And you received it at or about the time that
8 it's dated, which is September 1st, 1995; right?

9 A. I believe it may have been January 1995. That's
10 a British date.

11 Q. Ah, okay. With the day first, then the date --
12 or then the day -- month, and then the year; right?

13 A. Right.

14 Q. Okay. And this concerns D&O insurance; right?

15 A. That's correct.

16 Q. Does that reference the same policy that's the
17 subject of Exhibit 243?

18 A. Yes, it does.

19 Q. All right. What is D&O insurance?

20 A. Directors' and officers' liability insurance.

21 Q. All right. And this says, quote, "Please note
22 that due to an error by our insurance brokers the
23 figure given to you for Brown & Williamson's
24 proportion of the D&O premium should have read
25 270,000 pounds. I apologise for any inconvenience

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- 1 this may have caused." Correct?
- 2 A. Yes.
- 3 Q. Who did you receive this from?
- 4 A. This fax was sent to me by Jennie Smith,
- 5 secretary to Peter Radford.
- 6 Q. And who is Peter Radford?
- 7 A. Peter Radford is -- heads up risk management for
- 8 B.A.T. Industries.
- 9 Q. All right. And am I correct in assuming that
- 10 Brown & Williamson pays a portion of the D&O premium
- 11 for B.A.T. Industries directors' and officers'
- 12 liability policy?
- 13 A. I understand that B.A.T. Industries has taken
- 14 out a global directors' and officers' liability
- 15 insurance policy, and we pay a proportion of the
- 16 costs and are -- as a subsidiary of B.A.T.
- 17 Industries, and then, as other intervening companies,
- 18 we -- we enjoy some of the benefits of that
- 19 insurance.
- 20 Q. Is there a document that sets forth the benefits
- 21 of that insurance?
- 22 A. There's a policy document.
- 23 Q. And is that the policy that's referred to in
- 24 Exhibit 243?
- 25 A. That's correct.

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1 Q. Was there other communications concerning the
2 B.A.T. directors' and officers' liability policy that
3 you had in your files at the time the sweep was made?

4 A. At the time the sweep was made, while I had
5 oversight for risk management, another individual was
6 acting as risk manager and would have had any
7 documentation on the D&O policy in his files, his
8 departmental files.

9 Q. Who is that?

10 A. Craig Matta.

11 Q. Could you spell that, please.

12 A. M-a-t-t-a.

13 Q. Were Mr. Matta's files swept as part of the
14 document collection/production process?

15 A. I believe they were.

16 Q. Is there a way you can check to determine
17 whether they actually were?

18 A. Yes, there is.

19 Q. What -- what would you do to determine that?

20 A. I would refer you to the attachment to the May
21 6th letter.

22 Q. Okay. Speaking of that attachment, could you
23 turn to page nine of the attachment of Exhibit 238
24 that sets forth the general areas.

25 MR. WILLOUGHBY: Excuse me. Where are you

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1 referring to?

2 (Document displayed to Mr. Willoughby.)

3 MR. WILLOUGHBY: There you go.

4 THE WITNESS: So page nine now?

5 MS. WIVELL: Page nine of -- and I can't
6 find the --

7 MR. WILLOUGHBY: Attachment 10 --

8 MS. WIVELL: Thank you, 10.

9 MR. WILLOUGHBY: -- of the Louisville
10 active collection files log.

11 MS. WIVELL: Thank you.

12 THE WITNESS: I have it.

13 Q. All right. Do you see reference there to
14 Kendrick Wells?

15 A. Yes, I do.

16 Q. Do you understand, first of all, that this log
17 is a log created by King & Spalding of the areas that
18 were swept for responsive documents, the date they
19 were swept, and the inter -- the person who swept the
20 files?

21 A. It's my understanding that it is an extract from
22 a record that King & Spalding holds of the sweeps
23 that has been agreed to be provided to you, and
24 contains that information, yes.

25 Q. So it's not the complete document.

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1 MR. SCHNEIDER: Object to the form.

2 Q. All right. Well let me ask it this way: Is it
3 the complete document?

4 MR. SCHNEIDER: Object to the form.

5 A. It's my understanding that this is a complete
6 document. This document is an extract of a database
7 or a record that King & Spalding holds that outlines
8 matters of this nature, and additional matters.

9 Q. Do you understand that this is a printout of a
10 computer database?

11 A. I don't know how it was generated.

12 Q. Have you seen the documents that this is a part
13 of, the original?

14 A. In preparation for an earlier deposition I did
15 see an extract, as I believe I testified earlier.

16 Q. All right. Well let's go to the reference to
17 Kendrick Wells. When I looked at this document I
18 found his name only one time, and I -- I could make a
19 mistake, but do you know if he's referenced any other
20 place in this document?

21 A. I don't know.

22 Q. Could you take a look.

23 A. I see his name only once in the Louisville log.

24 Q. All right. Let -- let me ask you just one more
25 time what you understand the Louisville log to be.

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1 A. My understanding that this is, as was agreed
2 would be provided to you, a -- a summary of each
3 individual, each area that was included in the
4 document sweep by location, and indicates the
5 department, the person's files, or the area with
6 files that were swept, the date of that sweep, and
7 who did that sweep.

8 Q. All right. Now it says here that Kendrick
9 Wells' files were reviewed from 3-21-1996 to the
10 present. What's the date of this log?

11 A. Well this log has a date of 4-28-97 on it.

12 Q. All right. My question is this, then, does that
13 mean that his files from 19 -- from March 21st, 1996
14 forward were reviewed?

15 A. I don't know.

16 Q. Is there someone you could talk to to find out
17 the answer to that question? And -- and specifically
18 what I'm trying to find out is whether documents in
19 Mr. Wells' files that predate March 21st, 1996 were
20 reviewed.

21 MR. WILLOUGHBY: What was the question,
22 counsel, please?

23 Q. Are --

24 Were documents in Mr. Wells' files before March
25 21st, 1996, reviewed?

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1 A. My understanding is that, yes, they were. This
2 is the date that the sweep was undertaken in Mr.
3 Wells' office.

4 Q. All right. And that -- that's just what I was
5 trying to find out.

6 Who conducted the sweep?

7 A. It's my understanding that Mr. Willoughby. And
8 the initials are on the right-hand side. I believe
9 there's a table that gives you their names that's
10 attached.

11 Q. Mr. Willoughby is DHW?

12 A. I believe so.

13 Q. And who are ARG and TLP?

14 (Discussion off the stenographic record.)

15 A. On attachment four, DHW is Dan Willoughby, ARG
16 is Arlinda Gahlinger.

17 What was the other initial?

18 Q. TLP.

19 A. TLP is Terry L. Powell.

20 Q. All right. And do you understand that page two
21 of -- I'm sorry. Strike that.

22 Do you understand that attachment four is -- the
23 first page is the name of the individuals who were
24 responsible for the Macon document collection?

25 MR. WILLOUGHBY: Did you say attachment

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- 1 four, page one?
- 2 A. Attachment four, page one is the Macon -- a list
- 3 of the Macon document collection team.
- 4 Q. All right. And is page two a list of the
- 5 Louisville document collection team?
- 6 A. I believe so, yes.
- 7 Q. Page three is a list of the Minnesota document
- 8 collection team?
- 9 A. Yes.
- 10 Q. Page four is a list of the Lancaster document
- 11 collection team?
- 12 A. Yes.
- 13 Q. And page five is a list of the Hanmer document
- 14 collection team?
- 15 A. Yes.
- 16 Q. Page seven is the list of the Wilson document
- 17 collection team?
- 18 A. Yes.
- 19 Q. Page eight is the Reidsville document collection
- 20 team?
- 21 A. Correct.
- 22 Q. Okay. Attachment five is the list of the
- 23 attorneys involved in the privilege log preparation?
- 24 A. Yes.
- 25 Q. Has that list expanded since the court's recent

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1 order concerning privilege logs?

2 A. I believe additional people have been assigned

3 to achieve that deadline, yes.

4 Q. Are there additional names that need to be added

5 to up -- update or supplement this list?

6 A. Well I -- I believe it could be supplemented.

7 Q. Can you give us the names of people who -- who

8 should be added to attachment five?

9 A. If you would like us to do that, I can give it

10 to you.

11 Q. All right. All right. You can't right -- as we

12 sit here right now; right?

13 A. No, I cannot.

14 Q. All right. I'm going to ask: Would you agree

15 to provide that supplement?

16 A. Yes.

17 Q. Thank you. Has attachment six -- strike that.

18 Is attachment six complete as of today, or are

19 there names that should be added to it, too?

20 A. I don't know whether -- whether this is changed

21 since the production of this document.

22 Q. All right. Well let me do this: If you have --

23 if we went off the record and you spoke to Mr.

24 Schneider and Mr. Willoughby, would they be able to

25 tell you what update needs to be done to this

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1 document, Exhibit 238, to make it current as of
2 today?

3 MR. SCHNEIDER: Well I can tell you that
4 between May 6th and today there may have been
5 additional people involved in privilege logging and
6 document production. I don't know that for a fact.
7 I believe it's the case on privilege logging; I don't
8 know on document production.

9 We can go back, take a look at it and add
10 additional names.

11 MS. WIVELL: All right.

12 MR. SCHNEIDER: I don't know the names. I
13 don't know if Dan does, either. Is that correct,
14 Dan, you don't know all the names? Or do you?

15 MR. WILLOUGHBY: I couldn't list everybody
16 off the top of my head. But if you want us to
17 supplement this, you know, one time, I'd be happy to
18 do that.

19 MS. WIVELL: All right. I would appreciate
20 that.

21 BY MS. WIVELL:

22 Q. Sir, are there any additional changes to --
23 strike that.

24 Are there any corrections to Exhibit 238 that
25 you know of at this time?

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1 A. No.

2 Q. Sir, since last we had a deposition and
3 discussed document destruction, have you learned of
4 any additional documents which were in Brown &
5 Williamson's possession which were responsive to
6 plaintiffs' requests which have been destroyed?

7 A. No.

8 Q. Now can you turn to -- well strike that.

9 Do you remember our discussion at our first
10 deposition about the inquiry not being completed of
11 Shook, Hardy & Bacon?

12 A. I do.

13 Q. All right. Has that inquiry been completed?

14 A. I understand that it has. I understand -- or I
15 believe that a letter has been sent to you confirming
16 that.

17 Q. All right. Why were documents sent to Shook,
18 Hardy & Bacon?

19 MR. SCHNEIDER: Object to the form.

20 A. It's my understanding that Shook, Hardy & Bacon
21 acted as counsel for Brown & Williamson and had
22 access to our documents.

23 Q. Now there have been --

24 There has been testimony in this case that
25 Shook, Hardy & Bacon served as an archive for various

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1 documents from various cigarette manufacturers
2 throughout the years. Did Shook, Hardy & Bacon ever
3 serve as an archive for Brown & Williamson documents?

4 A. I don't know.

5 Q. Could we take a break and you ask your counsel
6 so that they could answer -- so you could answer that
7 question?

8 MS. WIVELL: Why don't we go off the
9 record.

10 THE REPORTER: Off the record, please.

11 (Discussion off the record.)

12 BY MS. WIVELL:

13 Q. Do you have an answer to the question, sir?

14 A. If you could repeat it, please.

15 Q. Did Shook, Hardy & Bacon ever serve as an
16 archive for originals of Brown & Williamson
17 documents?

18 A. I don't believe they did.

19 Q. All right. Have any other law firms served as
20 archives?

21 A. It's my understanding that Brown, Todd & Hayburn
22 and King & Spalding, and maybe one other whose name I
23 can't recall, has acted as a keeper of archive
24 records of Brown & Williamson.

25 MR. SCHNEIDER: Just to make sure that we

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1 avoid any confusion, Ms. Wivell, at various times the
2 Wyatt Tarrant firm, the Brown Todd firm and King &
3 Spalding have maintained sets of copies -- collected
4 sets of copies that have been reviewed in connection
5 with this and other litigation. King & Spalding does
6 not maintain original Brown & Williamson documents.
7 I don't believe that Wyatt Tarrant maintains original
8 Brown & Williamson documents.

9 There is a staff of persons from Brown Todd that
10 operate the space at the Kauffman Strauss Building.
11 That Kauffman Strauss Building contains various
12 collection sets of documents and may contain some
13 original documents. But for the most part, Brown &
14 Williamson original documents are in Brown &
15 Williamson's files.

16 Q. Does Brown & Williamson adopt the answer that
17 its counsel, Mr. Schneider, just gave, Mr. Lowther?

18 A. Yes.

19 Q. Was there ever a time that original documents
20 were kept at Shook, Hardy & Bacon?

21 MR. SCHNEIDER: Object to the form.

22 A. I don't believe so. I believe I answered that
23 Shook, Hardy & Bacon did not keep records of Brown &
24 Williamson.

25 Q. Sir, did Brown & Williamson's document

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1 collection process in this case include
2 communications, correspondence with other defendants
3 in this case?

4 A. It's my understanding that there were
5 communications with certain B.A.T. companies, as I
6 indicated in my earlier deposition, relating to
7 research and so on and so forth. But no searches
8 were undertaken at any other company of -- of --
9 within the BAT group of companies.

10 Q. All right. Well my question is a little bit
11 different than that, sir. Did Brown & Williamson's
12 document collection in this case include
13 sweep-up/collect documents from -- and let's put
14 B.A.T. Industries, BATUKE and BAT Co aside -- other
15 defendants in this case?

16 A. I don't believe so.

17 Q. Can you check, refresh your recollection to see
18 if documents that would have related to responsive
19 subjects that related to other non-United Kingdom
20 companies were included in the scope of the search?

21 MR. SCHNEIDER: Momentary break to avoid
22 confusion.

23 THE REPORTER: Off the record, please.

24 (Discussion off the record.)

25 BY MS. WIVELL:

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1 Q. All right. Sir, setting aside the United
2 Kingdom companies, B.A.T. Industries, BATUKE and BAT
3 Co, would Brown & Williamson's search for responsive
4 documents in this case included correspondence or
5 agreements with other tobacco cigarette manufacturers
6 who are defendants in this case?

7 A. Yes. Documents in Brown & Williamson files of
8 that nature would have been collected up as part of
9 the sweep.

10 Q. All right. Were responsive documents relating
11 to Brown & Williamson's relationships to other
12 tobacco defendants in this case produced to
13 plaintiffs if they existed and were not privileged?

14 A. I believe they were.

15 Q. Sir, could you turn in Exhibit 238 to question
16 45.

17 A. I have.

18 Q. Now there the question is: "What grounds of
19 privilege is B&W claiming in this case beyond
20 attorney-client, work product, or joint defense?"
21 Right?

22 A. Yes.

23 Q. And the answer is none; correct?

24 A. Yes.

25 Q. Now sir, I'd like to focus on joint defense.

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1 Does Brown & Williamson have a joint-defense
2 agreement with other defendants in this case?

3 MR. SCHNEIDER: Object to the form, beyond
4 the scope.

5 A. I'm not prepared on this topic. I don't know.

6 Q. Why don't we go off the record, because you --
7 You could ask and find out the answer to that
8 question, sir; couldn't you?

9 A. I could.

10 MS. WIVELL: All right. Why don't we go
11 off the record and you do so.

12 THE REPORTER: Off the record, please.

13 (Discussion off the record.)

14 A. It is my understanding that there is clearly
15 common interest in defending this case, and that if
16 any agreements exist in B&W files, they would have
17 been -- if requested, probably they would have been
18 privileged and recorded on a log.

19 Q. All right. Well I have looked through both the
20 4A, the 4B, and the priv logs that have been provided
21 so far and have not been able to find any references
22 to a joint-defense agreement. Are you saying that if
23 there is one, it would appear on the privilege log?

24 MR. SCHNEIDER: Object to the form.

25 A. I'm saying that if such a document existed in

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1 Brown & Williamson's files and indeed it were
2 responsive, it would have been logged on a privilege
3 log if it were responsive and privileged.

4 Q. All right. Now you told me earlier that Brown &
5 Williamson's sweep would have collected documents
6 relating to agreements or communications with other
7 defendants; correct?

8 A. I believe they would have been collected, yes.

9 Q. All right. And would it be fair to say that if
10 such a document exists, I would find reference to it
11 on the privilege log?

12 MR. SCHNEIDER: Object to the form.

13 A. If such a document were collected -- existed,
14 were collected and were responsive, I would have
15 expected it to have been logged on or about to be
16 logged on the privilege log.

17 Q. All right. Now do you understand all privilege-
18 log entries have to be provided by next Monday?

19 A. I understand that's the case.

20 Q. So would it be fair to say, then, if -- if after
21 Monday we do not find an entry for a privilege -- or
22 for a joint-defense agreement on the privilege log,
23 that it would be fair to assume the document does not
24 exist?

25 MR. SCHNEIDER: Object to the form.

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1 A. I think that that would be my assumption.
2 Obviously there's no guarantee that an error may not
3 have been made, and if indeed such a document were
4 found to exist which had not been produced or
5 provided on a log after Monday, and we were to learn
6 of that, we would correct that situation.

7 Q. All right. But as -- I'm sorry, strike that.

8 While we were off the record you had a
9 communication with Brown & Williamson's counsel
10 concerning the existence of the privilege log --
11 ah -- ah -- strike that.

12 While we were off the record you had a
13 conversation with Brown & Williamson's counsel
14 concerning the existence of a joint-defense
15 agreement; right?

16 A. Yes.

17 Q. All right. And as you sit here today, you have
18 no information that there is a written document which
19 is a joint-defense agreement between Brown &
20 Williamson and other defendants in this case; is that
21 right?

22 MR. SCHNEIDER: Object to the form.

23 Q. I'm sorry, Mr. Lowther?

24 A. That's correct.

25 MR. SCHNEIDER: Break to avoid confusion.

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1 THE REPORTER: Off the record, please.

2 (Discussion off the record.)

3 Q. Sir, you just had a conversation with counsel
4 off the record. Is there something you would like to
5 clarify?

6 A. Yes. My understanding is that any joint-defense
7 agreements may exist between counsel and may not in
8 fact be in Brown & Williamson's files. If they were
9 in Brown & Williamson's files, then they would have
10 been produced if they were responsive, or put on a
11 privilege log.

12 Q. If we were to take the time and go off the
13 record, could you determine for me and answer "yes"
14 or "no" whether there is a joint-defense agreement, a
15 written document that is in existence which is a
16 joint-defense agreement between defendants in this
17 case?

18 MR. SCHNEIDER: Let's go off the record.

19 THE REPORTER: Off the record, please.

20 MS. WIVELL: I'm sorry, can he answer the
21 question first?

22 MR. SCHNEIDER: Why don't you read -- read
23 back the question, if you will.

24 MS. WIVELL: All right. Well let me
25 restate it.

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1 Q. If we were to go off the record, could you
2 determine for me, so that you could answer when we
3 came back -- came back on the record, whether there
4 is a document in existence, a written document which
5 comprises a joint-defense agreement between any of
6 the defendants in this case?

7 A. Yes, I could.

8 Q. All right. And you could answer "yes" or "no,"
9 whether there is such a written document.

10 A. I believe I could.

11 Q. Would you do so, please.

12 A. Yes.

13 Q. Thank you.

14 MS. WIVELL: Let's go off the record.

15 THE REPORTER: Off the record, please.

16 (Discussion off the record.)

17 MR. SCHNEIDER: Ms. Wivell, while we were
18 off the record, you and I discussed the topic of a
19 joint-defense agreement, and I undertook at that time
20 to determine whether there is or are documents
21 entitled "Joint Defense Agreement," if so, whether
22 that document or documents are in B&W's files and
23 whether it has or has not been logged. I will try to
24 determine those -- those answers over the lunch break
25 and give you back a report.

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1 If I'm not able to determine them over the lunch
2 break, I'll send you a letter with respect to them,
3 but I will make an effort to try to determine it over
4 the lunch break and then we will report back to you.

5 MS. WIVELL: Also I think you said, correct
6 me if I'm wrong, that as you sit here you are not
7 aware of any document in existence right now entitled
8 "Joint Defense Agreement," but you may be aware of
9 documents that relate to litigation.

10 MR. SCHNEIDER: Well --

11 MS. WIVELL: Is that right?

12 MR. SCHNEIDER: Yeah, that's correct. That
13 is -- that is --

14 The first statement I made off the record with
15 respect to it was something to that effect. As I
16 reflected further on it in the second step, which
17 followed my remark, I was trying to picture in my
18 mind various documents, and it may be that that is
19 incorrect, and that's why I want to determine whether
20 there in fact is such a document by that name and
21 find out information about it.

22 MS. WIVELL: All right.

23 BY MS. WIVELL:

24 Q. Mr. Lowther, you have heard both the
25 on-the-record conversation and off-the-record

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1 conversation that Mr. Schneider and I just had about
2 the joint-defense-agreement subject; correct?

3 A. Yes.

4 Q. All right. Do you, as Brown -- Brown &
5 Williamson's spokesperson here today, adopt the
6 statements that Mr. Schneider just made?

7 A. Yes, I do.

8 MS. WIVELL: All right. Why don't we go
9 off the record, take a lunch break, and you can try
10 and find out the information and get back to me.

11 THE REPORTER: Off the record, please.

12 (Luncheon recess taken at 11:31 o'clock
13 a.m.)

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1 AFTERNOON SESSION

2 (Deposition reconvened at 1:47 o'clock
3 p.m.)

4 BY MS. WIVELL:

5 Q. All right. Before our lunch break there was
6 some conversation and questioning concerning the
7 issue of a joint-defense agreement. Do you have a
8 report to report back to us, Mr. Lowther?

9 MR. SCHNEIDER: Just let me interrupt, if I
10 may, Ms. Wivell.

11 I undertook to try to determine certain
12 information, and I'm -- I'm ready to give you what
13 I've been able to find out. And I think that would
14 be the most efficient way --

15 MS. WIVELL: All right.

16 MR. SCHNEIDER: -- to do so.

17 With respect to the issue of a joint-defense
18 agreement, I understand that there was a meet and
19 confer yesterday at which neither you nor I were
20 present, so you and I don't know anything about it,
21 but there was a meet and confer yesterday at which
22 this topic was discussed, and the defendants at that
23 meet and confer undertook to address that topic,
24 whether there is a joint-defense agreement, whether
25 there's a document with respect to it in a writing or

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1 letter, correspondence. That would be submitted to
2 the plaintiffs within a week. And actually that --
3 that will be done.

4 I can tell you that it is my understanding that
5 there has been a long-standing joint-defense
6 agreement among various defendants. With respect to
7 the topic of whether there is a document entitled
8 "Joint Defense Agreement," I myself am knowledgeable
9 of one such document. That document and this topic
10 generally, the facts with respect to it, whether the
11 document was logged and all other facts with respect
12 to it, will be addressed in the correspondence that
13 will arise out of the meet and confer.

14 BY MS. WIVELL:

15 Q. Mr. Lowther, on behalf of Brown & Williamson, do
16 you adopt the comments just made by your counsel?

17 A. Yes.

18 Q. All right. Let me ask you this, and I'll
19 address the question to both of you: I am not
20 interested just in any document that may say "Joint
21 Defense Agreement" at the top, but just so the record
22 is clear, I'm interested in any agreements or
23 understandings in writing which relate to,
24 memorialize, or reflect a joint-defense agreement
25 with the defendants. Would you agree to include in

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1 your letter any such written document, whether or not
2 they say "Joint Defense Agreement" at the top?

3 MR. SCHNEIDER: What I can agree, Ms.
4 Wivell, is we will address that topic. I -- I don't
5 have complete recall of all the document requests
6 you've made in this case, but I believe that there is
7 a document request that was served late in the case
8 that asked a similar topic. And there's already been
9 some correspondence on the topic. But I believe that
10 entire topic and the matters that you just raised
11 will be among the things addressed in the
12 correspondence that comes back to you.

13 BY MS. WIVELL:

14 Q. Mr. Lowther, would you agree on behalf of Brown
15 & Williamson to provide us the Bates numbers of any
16 documents or writings which in any way memorialize,
17 reflect, or relate to a joint-defense agreement that
18 may appear in Brown & Williamson's privilege log?

19 A. I think we can do that.

20 Q. All right. Good. Because the reason I say that
21 is sometimes privilege-log entries are difficult for
22 us to find the document that they actually are
23 because they're not as well described as we might
24 like. So if you would agree to do that on the record
25 for us, that would be of great help. Would you do

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1 that, sir?

2 A. Yes, I will.

3 Q. Thank you.

4 Could you turn to Exhibit 238.

5 A. I have it.

6 Q. All right. Would you turn to the question --

7 question 20, the question and answer 20. That

8 question and answer concerned whether Brown &

9 Williamson had a consulting agreement with Lance

10 Reynolds; correct?

11 A. Yes, that's right.

12 Q. Do you know who Mr. Pritchard is?

13 A. Mr. Pritchard is a former chief executive, I

14 believe, of Brown & Williamson.

15 Q. Does Brown & Williamson have a consulting

16 agreement with Mr. Pritchard?

17 A. I don't know.

18 Q. Does Brown & Williamson have an agreement with

19 Mr. Sanford?

20 A. I don't know.

21 Q. All right. Could you, if we went off the record

22 briefly, consult with counsel and find out the answer

23 to that question for us?

24 MS. WIVELL: Will you gentlemen --

25 The record should reflect that counsel have told

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1 me non-verbally they do not know.

2 Q. Will you, Mr. Lowther, on behalf of B&W, agree
3 to, within, say, the next week, report to me before I
4 take those gentlemen's depositions whether there are
5 any consulting agreements with those gentlemen?

6 A. I'll do so.

7 Q. Thank you.

8 MR. SCHNEIDER: May I interrupt a moment
9 and direct to the court reporter at line --

10 THE REPORTER: Just a moment, please. Off
11 the record.

12 (Discussion off the record.)

13 BY MS. WIVELL:

14 Q. Sir, has Brown & Williamson ever sent responsive
15 documents to former employees so that they could act
16 as document custodian for it?

17 A. I don't know.

18 Q. All right. Could you confer briefly with
19 counsel to get the answer to that question?

20 (Discussion between the witness
21 and his counsel.)

22 A. Not to my knowledge.

23 Q. Did Brown & Williamson, after it was merged with
24 American Tobacco Company, send any American Tobacco
25 Company documents to any lawyers to act as document

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1 custodian for those documents?

2 A. Not to my knowledge.

3 (Discussion off the stenographic record.)

4 MR. SCHNEIDER: A break to avoid
5 confusion.

6 MS. WIVELL: Certainly.

7 THE REPORTER: Off the record, please.

8 (Discussion off the record.)

9 A. Let me clarify my answer. After the merger of
10 American Tobacco and Brown & Williamson, a firm of
11 attorneys did, as a matter of fact, conduct a sweep
12 of American Tobacco records and do have those records
13 on behalf of the company and have produced two
14 million -- in excess of two million documents in
15 respect of those records.

16 Q. What law firm did -- are you referring to?

17 A. Chadbourne & Parke.

18 Q. And they did this on behalf of Brown &
19 Williamson?

20 A. That's correct.

21 Q. And so it would be fair to say that American
22 Tobacco Company documents have been sent to
23 Chadbourne & Parke, who is now acting as document
24 custodian; right?

25 A. Yes.

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1 Q. Who actually was responsible, the person
2 responsible, for determining what documents from
3 American Tobacco's files that were sent to Chadbourne
4 & Parke should be produced to the plaintiffs in this
5 case?

6 A. It's my understanding that was a task undertaken
7 by Chadbourne & Parke.

8 Q. And I'm asking you for the name of the
9 individual responsible.

10 A. I don't know.

11 Q. All right. Would you find out and report to me
12 after this deposition is over?

13 A. I'll do so.

14 Q. Thank you, sir.

15 Sir, at question 22 of the report, Exhibit 238,
16 the question is asked: "Did Brown & Williamson
17 produce documents in German? If it did so, did it
18 produce translations?" And in the report Brown &
19 Williamson said it did produce documents in German
20 without translation, and it says that several more
21 boxes of foreign-language documents are -- were
22 currently being prepared for production.

23 My question is: Are there translations made of
24 these documents that are in the possession of Brown &
25 Williamson or its attorneys?

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1 A. It's my understanding there may be some gross
2 translations. I don't know that every document has
3 been translated.

4 Q. Will Brown & Williamson provide the translations
5 of the responsive, non-privileged documents that have
6 already been produced in foreign languages to the
7 plaintiffs?

8 A. I'm sure we can do that.

9 Q. Thank you, sir. We would appreciate that.

10 MR. SCHNEIDER: A momentary clarification.

11 When we produced documents in the case, some
12 documents might have been in a foreign language that
13 related to the topics that were responsive. If there
14 were also translations of those documents which were
15 responsive, not privileged, they would have been
16 included. I'm not aware of any set of responsive,
17 non-privileged translations that we are -- that we're
18 holding back.

19 MS. WIVELL: All right. Will you check
20 and -- and assure yourself of it?

21 MR. SCHNEIDER: Yes.

22 MS. WIVELL: And you will report to us?

23 MR. SCHNEIDER: (Nodding.)

24 MS. WIVELL: Thank you.

25 BY MS. WIVELL:

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1 Q. Could you turn to question 28. There is a
2 question: "Did Eagle Star perform an epidemiological
3 study for Brown & Williamson?" And the response is,
4 "Our investigation has not identified such a study."
5 Is that right?

6 A. Yes.

7 Q. Let me ask you this: Did Brown & Williamson use
8 information in the possession of Eagle Star at any
9 time?

10 MR. SCHNEIDER: Object to the form.

11 A. I can't tell you what information that Eagle
12 Star has which Brown & Williamson may have learned or
13 made use of. We've had a relationship with Eagle
14 Star, clearly, for some years.

15 Q. All right. Do you know whether or not
16 information contained in Eagle Star's files was used
17 to do any kind of an epidemiological study?

18 A. I don't know. I can tell you that after an
19 investigation, we have not identified any such study
20 for Brown & Williamson by Eagle Star.

21 Q. I guess my question is a little bit
22 differently -- is a little bit different. I'm not
23 asking for something performed by Eagle Star, I'm
24 asking whether Brown & Williamson used information in
25 Eagle Star's possession to undertake some kind of

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1 analysis or study at any time.

2 MR. SCHNEIDER: Object to the form.

3 A. I don't know of anything, no.

4 Q. Would you find out and report back to us,
5 please?

6 A. Yes.

7 Q. Thank you. Were --

8 Sir, when Brown & Williamson was producing
9 documents for the plaintiff and copying those
10 documents -- and I'm talking about during the
11 production process -- were any pages ever removed
12 from those documents that there was not a redaction
13 stamp placed in the document?

14 MR. SCHNEIDER: Object to the form.

15 A. I don't know that I can guarantee that pages
16 weren't removed during the copy process, but that was
17 not, as I understand it, the way the procedure should
18 have operated. Documents were photocopied in -- in
19 whole, and decisions were made about redaction and
20 privilege in a -- in a separate basis.

21 Q. All right. Well I'm asking even before the
22 documents were copied to be produced. When they were
23 found, was there ever an instance where pages or
24 parts were removed?

25 A. Well I -- I can't --

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1 I can't, again, tell you that that was never the
2 case. That was certainly not part of the accepted
3 procedure. Documents were collected and taken away
4 for review and -- and kept together and returned
5 together.

6 Q. Do you know of any instance where pages were
7 removed from documents before they were copied?

8 A. I do not.

9 Q. Were documents split up during the production
10 process?

11 A. Well it's my understanding that decisions were
12 made as to whether documents were -- collected were
13 attachments or not, and -- and then treated in that
14 way when decisions were made about redaction and --
15 and privilege. But documents were kept together by
16 and large throughout the process.

17 Q. Sir, the reason I'm asking this is at question
18 30 it refers to some testimony we had regarding the
19 organizational chart that we marked during the first
20 portion of the deposition. Do you recall that, sir?

21 A. I do.

22 Q. And this document appears, at least to me, to be
23 a whole document as I marked it, but your answer --
24 Brown & Williamson's answer in Exhibit 238 suggests
25 that it was produced in pieces, which leads me to ask

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1 these questions about whether documents were taken
2 apart. Can you assure me that that did not happen?

3 A. My understanding in connection with this
4 specific issue as outlined in question 30 is that our
5 organization charts come in folders with dividers and
6 sections in, and this particular document may have
7 been identified as separate documents and produced.
8 Some of it was deemed to be responsive at the time
9 and some of it was not, and the responsive pieces
10 were produced. So I think that was the -- the
11 history behind this case.

12 We supplemented the answer by saying that,
13 nevertheless, you got full organization charts which
14 were produced at various times later.

15 Q. No, I understand that. But this particular
16 document raised the issue.

17 Let me ask you this: You said "folders." Were
18 they actually not bound together in any way with a
19 staple or some kind of a binding?

20 A. Our organization charts are updated regularly,
21 so they -- they sometimes come in folders, sometimes
22 they don't. But they're made available and updates
23 are produced. So I don't know how these particular
24 ones were found, but some were swept up.

25 Q. Okay. I guess my question is more along the

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1 lines of this: I am showing you a transcript from
2 the court reporter that has been bound together;
3 right?

4 A. Uh-huh.

5 Q. Now in the document collection and production
6 process for this case, were there ever circumstances
7 where documents which were like this were, which were
8 originally bound, were unbound, pages taken out, and
9 the pieces provided to the plaintiffs?

10 A. Clearly I can't guarantee that that never
11 happened, but that was not the way that the document
12 production process was designed. And the people were
13 told to keep documents -- to keep documents in --
14 with integrity. If they were bound, they were
15 treated as one document.

16 Q. All right, sir. Could -- could you turn to
17 question 33. That question concerns a list of
18 locations swept and it gives seven locations; right?

19 A. Yes.

20 Q. Have we now learned of an eighth location that
21 was disclosed in supplemental interrogatories after
22 we previously spoke in April?

23 MR. SCHNEIDER: Objection to form.

24 A. Well I think that we did search seven
25 locations. I think we have referred earlier in the

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1 deposition today to a storage location in Macon that
2 has -- we have gone back to review, but I think
3 outside of that we have also made an undertaking to
4 search the Washington sales office, but I'm not aware
5 of any other locations that were searched.

6 (Plaintiffs' Exhibit 245 was marked
7 for identification.)

8 BY MS. WIVELL:

9 Q. Sir, showing you what's been marked as Exhibit
10 245, those are supplemental responses of Brown &
11 Williamson to certain of Plaintiffs' interrogatories;
12 correct?

13 A. Right.

14 Q. And this is the document that refers -- or that
15 supplements the previous interrogatories concerning a
16 storage facility; right?

17 A. Yes, it is.

18 Q. And it says on the third page of the document,
19 "By way of further information and while documents to
20 be reviewed are not covered, Brown & Williamson's
21 counsel report that they have just identified a
22 third-party storage facility in Macon operated by
23 Data Management where various departments at the
24 Macon Plant send storage boxes." Have I read it
25 correctly so far?

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1 A. Yes, you have.

2 Q. How did it come to be determined that this
3 storage facility existed?

4 A. It's my understanding that a document referenced
5 a Data Management facility, and that this was noticed
6 and -- by outside counsel, and a question was asked,
7 "Well, what is this?" And following on from that we
8 made this supplemental response.

9 Q. So in your -- your entire preparation for your
10 deposition that was taken in April, nobody told you
11 about this document storage facility?

12 A. Well I think that during the course of the
13 document sweeps interviews were held with Brown &
14 Williamson -- large numbers of Brown & Williamson
15 personnel, and as I said in my deposition earlier,
16 this particular storage facility does not typically
17 hold documents which are, you know, immediately
18 considered to be responsive, it holds documents
19 relating to purchasing, distribution and
20 administrative matters, and during the sweep of Macon
21 it was not referenced by any Brown & Williamson
22 employee. Nevertheless, having learned about it,
23 we've taken steps to go and review all the records
24 there, and I believe we've already produced documents
25 that are considered responsive from that location, a

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1 small number of those.

2 Q. Would you please --

3 Can you tell us what box those were produced in?

4 A. I can investigate and report to you --

5 Q. Thank you.

6 A. -- later.

7 Q. But I don't think you answered my question,

8 sir. My question was: Nobody, during the entire

9 preparation for your deposition in April of this

10 year, mentioned this facility to you; is that right?

11 A. They did not mention this specific facility, no.

12 Q. Are there any other facilities where Brown &

13 Williamson has documents stored that have not been

14 disclosed?

15 A. I don't know of any.

16 Q. Did you ask counsel in preparation for your

17 deposition today whether there were any?

18 A. In preparation for today I did not.

19 Q. Well, did you take part in preparing this

20 interrogatory answer which has been marked as 245?

21 A. I did not.

22 Q. All right. Have you at any time before today

23 asked them if there were any facilities, further

24 facilities that hadn't been disclosed to you?

25 A. I have asked generally, while preparing for this

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1 and other depositions, the scope of the searches that
2 were done and the scope and the extent to which
3 inquiries were made to establish where records were
4 kept, and I think that, based on my responses and my
5 knowledge and my personal involvement of the sweeps
6 that were done, we would have discovered all
7 significant locations and swept them. This one was
8 perhaps an unfortunate error, but we've taken every
9 step to correct that and make good.

10 Q. So you would agree that despite all of the
11 preparation that was done to try and get you ready to
12 give complete and accurate answers at your deposition
13 in April, when it came to sites swept for documents,
14 your answers weren't complete; were they?

15 MR. SCHNEIDER: Object to the form.

16 A. I think my answers were complete. I described
17 the extent and the efforts that were taken, the
18 process that we went through, and given the -- the
19 scale and the scope of -- of operations, errors can
20 be made. And Brown & Williamson has indicated that
21 when it is aware of an error, it will correct it.

22 Q. Well sir, I asked you in your previous
23 deposition about the locations where Brown &
24 Williamson stored documents; didn't I?

25 A. Yes, you did.

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1 Q. And your answers, through no fault of your own,
2 were not complete; were they, sir?

3 A. We were not aware of this particular location at
4 that time, that's correct.

5 Q. Well somebody at Brown & Williamson was
6 certainly aware of it; weren't they?

7 A. Yes, they were.

8 Q. From time to time at this deposition you have
9 talked about instructions given to the people who
10 were producing and logging the documents. Were --
11 Who gave those instructions?

12 A. Well it's my understanding that that was given
13 by King & Spalding personnel, by and large.

14 Q. Who specifically was responsible for that?

15 A. I think Mr. Willoughby.

16 Q. Were there written instructions that were given
17 to the people who were reviewing for responsiveness?

18 A. It's my understanding that they were provided
19 with training, they were provided with the document
20 requests, later document requests, and other items to
21 help them in that -- that task.

22 Q. What else did their training include?

23 A. I don't know specifically the -- the scope of
24 it. I understand they went through several days of
25 training on -- on the -- the requirements of this

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1 case.

2 Q. Were there written materials that were provided
3 to the people who were reviewing for responsiveness?

4 A. Certainly in respect of privilege
5 decision-making, there were apparently volumes of
6 training materials, including the Minnesota
7 complaint, as outlined in this -- this -- this
8 letter.

9 Q. Which answer are you responding to -- or
10 referring to?

11 A. Question 44 references that documentation.

12 Q. Have these written materials been retained?

13 A. I don't know.

14 Q. Do they still exist?

15 A. Some of them clearly do since they're, you know,
16 exhibits in this -- in this deposition.

17 Q. Which materials were used in training that are
18 exhibits to this deposition?

19 A. Well the document requests.

20 Q. But the other written materials that are
21 referred to in question 44, do they still exist?

22 A. I don't know.

23 Q. All right. Would you agree to find out and
24 report back to us?

25 A. Yes, I will.

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1 Q. All right. And if they still exist, would Brown
2 & Williamson agree to keep them and not destroy them?

3 A. I believe it would have to be King & Spalding
4 that would have to make that agreement.

5 Q. Well King and --

6 Brown & Williamson directs its lawyers; doesn't
7 it?

8 MR. SCHNEIDER: Object to the form.

9 A. Let -- let me say that I know that King &
10 Spalding undertook to keep interview notes at the
11 earlier deposition. I see no reason why they would
12 not be happy to keep these training documents if you
13 so wished.

14 Q. All right. And on behalf of Brown & Williamson,
15 would you agree to ask King & Spalding to keep its
16 training materials if they still exist today?

17 A. I'll do so.

18 Q. Thank you.

19 Could you turn to question 47.

20 A. I've done so.

21 Q. All right. There I had asked a question, and
22 there's an answer regarding the B&W Bates numbering
23 system; right?

24 A. Yes.

25 Q. And it says the Bates number system includes

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1 initial identifying numbers indicating where the
2 document came from; correct?

3 A. That's correct.

4 Q. What -- what does this mean? Can you explain a
5 little bit further?

6 A. It's my understanding that the first three
7 numbers of the Bates number will indicate the
8 location of -- of where the document came from, and
9 the balance of the number is just a sequential
10 numbering system.

11 Q. Is there a list of areas that corresponds with
12 the -- strike that.

13 Is there an index so that one could look and
14 say, "Oh, document 650 came from this department?"

15 A. I can tell you that it's possible to find out
16 which department a document came from from the Bates
17 number. I don't know, you know, the exact mechanism
18 by which that decision is made, whether there is an
19 index or a database.

20 Q. All right. Will you find out whether there is
21 an index or a database?

22 A. Yes, I will.

23 Q. And you'll report back to us after the
24 deposition?

25 A. Yes.

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1 Q. All right. If there is an index, would you
2 agree to produce it to the plaintiffs?

3 MR. SCHNEIDER: Object to the form.

4 A. If it's something that can reasonably be done
5 and it's not work product, attorney privilege, et
6 cetera, then I'll -- I'll endeavor to do that.

7 Q. All right. Well all I'm asking, just so that
8 we're clear, is some way of figuring out so we know
9 what the first three numbers of the Bates number
10 stamps were. That's all I'm asking for. Would --
11 would you folks agree to do -- provide that for us?

12 MR. SCHNEIDER: Ms. Wivell, let us consider
13 that. Obviously, any documents that we have with
14 respect to the way in which we've numbered documents
15 and collected are work product, but perhaps there is
16 a happy medium that we can find on this subject, and
17 I will endeavor to determine if it exists.

18 MS. WIVELL: I would appreciate that.
19 Because I'm not asking for your analysis of the
20 documents, but just if -- "If they were taken out of
21 the law department's files, they have this number,"
22 we'd like to know that.

23 MR. SCHNEIDER: We'll endeavor to address
24 that question, see what -- whether we can respond.

25 MS. WIVELL: Thank you.

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1 BY MS. WIVELL:

2 Q. Could you turn to page 67 -- or question 67.

3 There it asks: "Does B&W have document-by-document
4 indices to all of its previously collected sets;"
5 correct?

6 A. Yes.

7 Q. The answer is no; right?

8 A. Yes.

9 Q. Does Brown & Williamson have document-
10 by-document indices to any other of its collected
11 sets?

12 A. Well it's my understanding that there is a
13 database which King & Spalding has or has access to
14 which references documents produced in this case;
15 documents reviewed in this case.

16 Q. Well I'm -- I'm asking about other collected
17 sets.

18 A. Well I think, as indicated here, we do not have
19 a document-by-document index of those previously
20 collected sets.

21 Q. Well this says of -- "to all of its previously
22 collected sets," and I'm asking whether there is a
23 document-by-document index to any of its previously
24 collected sets.

25 MR. SCHNEIDER: Momentary conference to

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1 avoid confusion.

2 THE REPORTER: Off the record, please.

3 (Discussion off the record.)

4 A. It is my understanding that the 4A index is the
5 only index of previously collected sets.

6 Q. All right. Mr. Lowther, I'm just about done.
7 Just a couple questions.

8 I understand you're going back to England; is
9 that right?

10 A. Yes, that's right.

11 Q. Were you at -- working at Brown & Williamson as
12 a result of a secondment?

13 A. No.

14 Q. What are you going to do back in England?

15 A. I'll be taking an audit controller's position
16 in -- in England.

17 Q. What company?

18 A. British American Tobacco Holdings.

19 MS. WIVELL: I have nothing further.

20 MR. SCHNEIDER: Thank you very much.

21 THE REPORTER: Off the record, please.

22 (Deposition concluded at 1:26 o'clock p.m.)

23

24

25

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1 C E R T I F I C A T E

2 I, Richard G. Stirewalt, hereby certify
3 that I am qualified as a verbatim shorthand reporter;
4 that I took in stenographic shorthand the testimony
5 of RICHARD M. LOWTHER at the time and place
6 aforesaid; and that the foregoing transcript
7 consisting of pages 455 through 579 is a true and
8 correct, full and complete transcription of said
9 shorthand notes, to the best of my ability.

10 Dated at Minneapolis, Minnesota, this 6th
11 day of June, 1997.

12

13

14

15 RICHARD G. STIREWALT

16 Registered Professional Reporter

17 Notary Public

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1 C E R T I F I C A T E

2 I, RICHARD M. LOWTHER, the deponent, hereby
3 certify that I have read the foregoing transcript
4 consisting of pages 455 through 579, and that said
5 transcript is a true and correct, full and complete
6 transcription of my deposition except:

7

8

9

10

11

12

13

RICHARD M. LOWTHER

14

Deponent

15

16 Sworn and subscribed to before me this day

17 of , 1997.

18

19

20

21

Notary Public

22

23

My commission expires .

24

25

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